Supreme Court, U.S.
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No. 90-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In re WILLIAM M. KUNSTLER,

Petitioner,

ROBESON DEFENSE COMMITTEE, *et al.*,

Plaintiffs,

—v.—

JOE FREEMAN BRITT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William M. Kunstler petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit entered in this proceeding on September 18, 1990.

QUESTIONS PRESENTED

1) May a defendant who consents to a motion to dismiss with prejudice under Rule 41(a)(2) of the Federal Rules of Civil Procedural, without any conditions or reservations, seek sanctions under Rule 11 forty-five days after the district court has granted the motion to dismiss in the form submitted by the plaintiffs?

2) May a district court, consistent with the Due Process Clause and Rule 56 of the Federal Rules of Civil Procedure, impose in excess of $100,000 in sanctions against three attorneys, on the ground that they filed their complaint for an "improper purpose," and with insufficient factual or legal grounds, without conducting an evidentiary hearing to resolve sharp conflicts in the facts in the affidavits before the court, where the court had no prior judicially acquired knowledge of the case?

PARTIES TO THE PROCEEDINGS

Petitioner William M. Kunstler an appellant in the Court of Appeals, is one of three attorneys-at-law who represented the plaintiffs in the underlying action.[1] Plaintiffs in the underlying action are Robeson Defense Committee,

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[1] Barry Nakell and Lewis Pitts, attorneys who also represented the plaintiffs in the district court and were appellants below, do not join in this petition but will file their own petitions within the period allowed by law.

Carnell Locklear, Mary Sanderson, Thelma Clark, Eleanor Jacobs, Betty McKellar, Eddie Hatcher, and Timothy Bryan Jacobs. The defendants in the underlying action who moved for Rule 11 sanctions against the petitioners and are appellees in the Court of Appeals are: Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, Hubert Stone, Lacy H. Thornburg, Robert Morgan, James Bowman, James G. Martin, SBI Doe I, SBI Doe II, SBI Doe III, Deputy Sheriff Doe I, Deputy Sheriff Doe II, Deputy Sheriff Doe III, Deputy Sheriff Doe IV, Deputy Sheriff Doe V, District Attorney Doe I, District Attorney Doe II, District Attorney Doe III, and Robeson County.

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OPINIONS BELOW

The Court of Appeals for the Fourth Circuit issued a decision on September 18, 1990 affirming in part and vacating in part a judgment of the U.S. District Court for the Eastern District of North Carolina which imposed sanctions under Rule 11 on the petitioner and Messrs. Nakell and Pitts, and remanded the case for redetermination of the amount of the award in accordance with its instructions. The opinion of the Court of Appeals is reported at 914 F.2d 507 and a copy is annexed as Appendix A. A copy of the Opinion and Order of the District Court issued September 28, 1989, which is unreported, awarding sanctions in the amount of $122,834.28 against petitioners and Messrs. Nakell and Pitts is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1990. Its order denying petitions for rehearing filed by petitioner and by Messrs. Nakell and Pitts was entered on October 11, 1990. A copy of this order is annexed as Exhibit C. On October 18, 1990 it entered an ordering staying the mandate in the case until November 19, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject

> for the same offence to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Rule 11, Federal Rules of Civil Procedure, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 41((a), Federal Rules of Civil Procedure, in pertinent part:

(a) Voluntary Dismissal: Effect Thereof.

(1) Subject to the provisions of Rule 23(d), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of the Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 56, Federal Rules of Civi Procedure, in pertinent part:

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon

all or any part thereof.

(c) MOTION AND PROCEEDING THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

STATEMENT OF THE CASE

This petition concerns the imposition of Rule 11 sanctions in the amount of $122, 834.28[2] against three attorneys who brought a civil rights action on behalf of members of the minority community of Robeson County, North Carolina, against law enforcement officers of the County and the State. Barry Nakell is a professor at the University of North Carolina School of Law; Lewis Pitts is Director of the Christic Institute South, a public interest law firm located in Carrboro, North Carolina; William Kunstler is nationally known as a lawyer who has espoused unpopular clients in scores of civil and criminal trials. We first summarize the events that led to the filing of the complaint.

Events Preceding the Complaint

On February 1, 1988 two Tuscarora Indians, Eddie Hatcher and Timothy Jacobs, entered the offices of a local newspaper, The Robesonian, and took twenty hostages. Their object was to focus media attention on their previously ignored charges of pervasive corruption and criminal conduct by the chief law enforcement officers of Robeson County, on their personal need for protection from such law enforcement officers, and to obtain a commitment for an investigation by state law enforcement agencies. After negotiations with the Governor's office and a number of local political figures, the Governor agreed that, in return for release of the hostages unharmed, he would establish a Task Force to investigate the District Attorney's Office, the Sheriff's Office, and the local and district offices of the State Bureau of Investigation ("SBI"). It was a crucial part of the agreement that Hatcher and

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[2] The award included a fine of $10,000 against each of the attorneys. The Court of Appeals struck the fines from the judgment and remanded for a redetermination of the remainder.

Jacobs, who expressed fear of the county authorities, could surrender to federal authorities rather than to the county authorities who were the target of their allegations.

Promptly after their surrender, federal indictments were returned against Hatcher and Jacobs. Mr. Britt, the Robeson County District Attorney, thereupon dismissed state kidnapping charges as pre-empted by the federal authorities. On October 14, 1988 after a three week trial the federal jury acquitted the defendants on all counts. Mr. Hatcher then undertook a campaign, with the support of the Robeson Defense Committee, to remove the Sheriff and his son, the Deputy Sheriff, from office. The SBI thereupon began to interview persons connected with the Defense Committee, and newspapers reported statements from the SBI and the District Attorney that the SBI was investigating whether other persons were involved in a conspiracy to take hostages on February 1. The political activity to remove the Sheriff and his son thereupon cooled. Meanwhile the District Attorney announced plans to call on a Grand Jury to reinstate the state charges against Hatcher and Jacobs. Their attorneys, Messrs. Nakell and Pitts, represented to Mr. Britt and to counsel for the Governor that a state prosecution would violate the agreement with the Governor's office that they would not be subject to the Robeson County authorities. Nevertheless, on December 6, 1988, Hatcher and Jacobs were indicted by the Robeson County Grand Jury on kidnapping charges. Both before and after the indictment, Nakell and Pitts protested in meetings, letters and telephone calls with the Governor's Task Force, the Attorney General and other top State officials that the activities of Mr. Britt and the SBI were causing a climate of fear in Robeson County which inhibited the people's exercise of their first amendment rights. Their efforts to have the SBI activities stopped did not succeed.

The Lawsuit

On January 31, 1989 Mr. Nakell filed a complaint under 42 U.S.C. § 1983 in the U.S. District Court for the Eastern District of North Carolina on behalf of Messrs. Hatcher and Jacobs, the Robeson Defense Committee, and five Native American and Black residents of the County active in the work of the Committee. The complaint named as defendants the District Attorney, Sheriff and other principal law enforcement officers of Robeson County, members of their staffs, the Director and agents of the SBI, and the Governor and Attorney General. As later amended,[3] the complaint recounts a campaign of intimidation of the Defense Committee and sets forth the circumstances that led to the second prosecution. It alleges, *inter alia*, violations of first amendment rights; acts designed to interfere with the attorney-client relationship; initiation of the second prosecution in bad faith; and approval of, or acquiescence in, the alleged constitutional violations by the Attorney General and the SBI Director. The plaintiffs sought an injunction against a continued campaign of harassment of the movement to remove the Sheriff and Deputy Sheriff from office, including interference with the use of public meeting facilities, against continued interference with the attorney-client relationship established by Jacobs, and against the criminal prosecution. They also sought damages against all defendants named in their individual capacity and against Robeson County.

The plaintiffs promptly sought discovery, but all discovery was stayed by the court. On March 29, 1989, the defendants filed motions to dismiss accompanied by affidavits.

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[3] The amended complaint was also signed by Messrs. Pitts and Kunstler.

The record plainly establishes that before filing the complaint counsel had made every effort by discussions with State officials to protect their clients' rights to conduct political activities without official interference, and to protect them from what they considered to be a State prosecution in violation of the agreement which resolved the February 1, 1988, incident.

The Voluntary Dismissal

By April a number of circumstances had coalesced to lead to a judgment that the case should not be prosecuted: a split between Hatcher and Jacobs, who had made a separate plea bargain with the prosecution; the diminished viability of the Robeson Defense Committee and its petition drive to replace the Sheriff and Deputy Sheriff as a result of the chilling of political activities by the SBI; the apparent termination by the SBI of its "conspiracy investigation"; and the frustration caused by the stay of discovery.

Mr. Nakell communicated to the attorney for the defendants the plaintiffs' decision to proceed with a stipulated dismissal with prejudice pursuant to Rule 41(a)-(1)(ii). He was advised that he could represent that the defendants did not object to the dismissal. When he asked whether the defendants would stipulate to the dismissal to avoid the necessity for a court order, he was told it would take time to secure the necessary authority and was requested to proceed instead under Rule 41(a)(2) to which defendants would consent.

Plaintiffs thereupon submitted a motion for dismissal under Rule 41(a)(2) which stated, in accordance with what Mr. Nakell had been advised, that "counsel for all defendants have authorized plaintiffs to represent to the Court that they do not oppose this motion and do not object to the Court granting it." The motion and a proposed order were signed by the district judge on May

2. Neither the motion nor the order contained any terms or conditions of dismissal reserving any right on the part of the defendants to take any further action in the case. Nor did the defendants mention, let alone seek, any such term or condition.

The Rule 11 Motion

On June 13, forty-five days after entry of the order of dismissal, the state defendants filed a Rule 11 motion agains the three attorneys but not their clients. The motion claims that the attorneys acted for an improper purpose and that the complaint had no factual basis and was not well grounded in law. Two weeks later the county defendants also made Rule 11 motions. On August 8 plaintiffs' attorneys moved for an evidentiary hearing. The court did not rule on this motion, and no evidentiary hearing took place. After hearing argument on the Rule 11 motions on September 8, the court, which had held no prior hearings in the underlying case, or made any substantive rulings, invited the defendants to submit statements of their fees and expenses. These were submitted on September 27. On September 29, before plaintiffs' attorneys could respond, the court issued its opinion finding that they had violated Rule 11 and imposing sanctions in the amount of $92,834.28, the exact amount requested in defendants' submission. In addition, the court imposed punitive sanctions of $10,000 against each of plaintiffs' attorneys on the basis of allegedly unwarranted allegations against high-ranking public officials which received notoriety in the press.

Although the parties' affidavits presented sharply conflicting versions of critical facts, the court made its determinations, including evidentiary findings, solely on the basis of the affidavits and other written materials, without listening to a word of testimony or permitting the cross-examination of any affiant or the taking of any deposition to help resolve factual conflicts.

The District Court's Opinion.[4] In its opinion, the court first disposed of petitioners' argument that the dismissal precluded the defendants from bringing a Rule 11 motion on the ground that terms and conditions that may be imposed upon a voluntary dismissal are for the protection of the defendant, and that no such protection is needed when the dismissal, as in this case, is with prejudice. App. B at 43a-44a. The court did not allude to the fact that the defendants had consented to the dismissal without any reservation of rights.

The opinion then addressed the "improper purpose" prong of Rule 11 first because the court is "greatly concerned with the motives of plaintiffs' attorneys and the manner in which they have conducted themselves." *Id.* at 44a. The court concluded that "plaintiffs' attorneys initiated the § 1983 action not to vindicate constitutional rights, but more probably to gain publicity and to influence the State prosecution then underway against Hatcher and Jacobs." *Ibid.* It based this conclusion on speculative inferences from the timing of the suit, the holding of a press conference, the sending of a copy of the complaint to the State court judge likely to preside in the criminal trial, the ability to obtain discovery unobtainable under North Carolina criminal procedure, and "most damning of all, . . . the sudden and inexplicable" voluntary dismissal with prejudice. *Id.* at 47a. The district court also ruled that the complaint had no factual basis and was not well grounded in law.

Opinion of the Court of Appeals.[5] In its opinion the

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[4] We refer here only to those portions of the opinion which are relevant to this petition.

[5] Here, again, we refer only to those portions of the opinion relevant to the petition.

Court of Appeals upheld the ruling of the court below that Rule 11 sanctions were not precluded by the dismissal on the grounds that the present case did not involve a stipulated dismissal but one under Rule 41(a)(2) and petitioners were not prejudiced by the delay in filing the motion. App. A at 7a-10a. The Court of Appeals also upheld the District Court's finding of "improper purpose," although commenting that a court should consider the first two prongs of Rule 11 before making such a determination. *Id.* at 21a-27a. On the issue of whether an evidentiary hearing is required to make a finding of "improper purpose," the Court of Appeals held that the failure to hold such a hearing did not violate due process. *Id.* at 27a-30a. It stated:

> Although the number of credibility findings which the court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value, we affirm the court's findings that appellants violated all three prongs of Rule 11 because the findings are not clearly erroneous even excluding some evidence of "improper motive" which appellants contested.
>
> The district judge's participation in the proceedings was adequate to give him full knowledge of the relevant facts without the necessity of an evidentiary hearing. The district court had before it the pleadings, the summary judgment motions of the state defendants and the 12(b) motion of the county defendants. We also find that counsel were given an adequate opportunity to contest the court's determination that Rule 11 was violated. The district court allowed appellants to submit affidavits, and voluminous written legal arguments. The district judge also heard oral argument. We find that due process requirements were satisfied by the

> opportunities appellants were given to respond to the charges that their complaint violated Rule 11.

App. A at 29a-30a.

The failure of the district court to hold an evidentiary hearing is punctuated by the fact that, although the county defendants filed a separate Rule 11 motion alleging different grounds than the state defendants and requiring different responses from petitioners, the court never ruled on the county defendants' motion. Accordingly it had no basis to award sanctions to the county defendants for their costs and attorney's fees.

REASONS FOR GRANTING THE WRIT

A. THE HOLDING OF THE COURT OF APPEALS THAT A DISTRICT COURT MAY ENTERTAIN A MOTION FOR RULE 11 SANCTIONS MADE FORTY-FIVE DAYS AFTER A VOLUNTARY DISMISSAL WITH PREJUDICE UNDER RULE 41(a)(2) WHEN THE ORDER OF DISMISSAL IS MADE ON CONSENT OF THE DEFENDANT WITHOUT ANY RESERVATION OF THE RIGHT TO PROCEED UNDER RULE 11 CONFLICTS WITH THE DECISIONS OF ALL OTHER CIRCUITS AND INTRODUCES UNCERTAINTY INTO THE APPLICATION OF THE RULES PROMULGATED AND ADMINISTERED BY THIS COURT.

In June of this year this Court decided *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), which dealt with the power of a court to award Rule 11 sanctions after a voluntary dismissal by the plaintiff under Rule 41(a)(1)(i). The situation presented by this petition is entirely different. In *Hartmarx Corp.* this Court dealt with the question whether a plaintiff could unilaterally escape the consequences of filing a frivolous complaint by dismissing it before the defendant had answered or moved for summary judgment. A Rule 41(a)(1)(i) dismissal is a unilateral action by a plaintiff as to which neither the

defendant nor the court has any input. Such unilateral action is not possible after the filing of an answer or a motion for summary judgment as in this case. In such a circumstance, voluntary dismissal must proceed under Rule 41(a)(1)(ii) or 41(a)(2), both requiring input by the defendant and, in the case of 41(a)(2), approval by the court. The considerations applicable to dismissal under these paragraphs are thus wholly different from the considerations where a plaintiff acts unilaterally as in *Hartmarx Corp.*

The appellate decisions in all other circuits, and a number of district court decisions as well, have uniformly held that where a plaintiff has moved for dismissal under Rule 41(a)(2), and an order of dismissal with prejudice is entered upon consent of the defendant, without any term or condition reserving the defendant's right to move for Rule 11 sanctions, the district court may not grant such sanctions in response to a motion made subsequent to the dismissal. These decisions are not grounded on the loss of jurisdiction by the district court after a dismissal with prejudice, but upon the concept of "fundamental fairness" to the plaintiff, who would otherwise be trapped into a dismissal upon conditions that he did not contemplate when he filed his motion. The least that is required is that such circumstances the plaintiff should retain the option to withdraw his motion and proceed with the lawsuit.

This rationale applies equally to a stipulated dismissal under Rule 41(a)(1)(ii) when the defendant has consented to the dismissal without any reservation of rights, and to a dismissal under Rule 41(a)(2) when the order does not include any "terms and conditions." The present case partakes of both situations. Plaintiffs originally sought a dismissal with prejudice pursuant to stipulation under Rule 41(a)(1)(ii). The defendants said they had no objection and that the plaintiffs' attorneys could so represent to the court, but preferred that the plaintiffs proceed by way of

a motion for a court order under Rule 41(a)(2). Their consent to the dismissal was given without any reservation of the right to move for Rule 11 sanctions or any indication that they were considering such a motion.[6] The plaintiffs' motion papers under Rule 41(a)(2) stated that "counsel for all defendants have authorized plaintiffs to represent to the Court that they do not oppose this motion and do no object to the Court granting it." In signing the proposed order submitted by the plaintiffs, the district judge knew that he was signing a consent order. The proposed order did not contain any terms or conditions, and the judge did not insert any.

Stipulated Dismissals. In *Barr Laboratories, Inc. v. Abbott Laboratories*, 867 F.2d 743 (2nd Cir. 1989), the court of appeals held that "fundamental fairness" mandated the denial of the defendant's Rule 11 motion after a stipulated dismissal when the defendant's attorney had given no indication that Rule 11 sanctions would be sought. Under these conditions, it stated that

> we have no hesitancy in saying that it would be manifestly unfair to award sanctions against Barr and in enunciating a rule that would prohibit a motion for Rule 11 sanctions after the execution of a stipulation of dismissal without a reservation in the stipulation of the right to move for such relief.

867 F.2d at 748. The stipulation had been "So Ordered"

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[6] The Rule 11 motion was not made until 45 days after the dismissal. It clearly violated the obligation of a party seeking sanctions to give notice to the court and the offending party promptly upon discovery of the basis for doing so. Advisory Committee Notes, Rule 11; see, e.g., Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 879 (5th Cir. 1988) (in banc).

by the district judge although his approval was not required under Rule 41(a)(1)(ii). It is difficult to discern any practical distinction between a "so ordered" stipulation of dismissal without a reservation of rights and a dismissal order signed on consent without such a reservation. The procedural difference does not alter the unfairness.

Dismissal with Terms and Conditions. Where a voluntary dismissal is sought by motion under Rule 41(a)(2), the court is empowered to include in its order such "such terms and conditions as the court deems proper." Where the order contains no terms or conditions, it is improper to grant a motion for Rule 11 sanctions or the assessment of costs and attorney's fees where the dismissal is with prejudice. *Colombrito v. Kelly*, 764 F.2d 122, 133-35 (2nd Cir. 1985) (where lawsuit voluntarily dismissed *with prejudice* under Rule 41(a)(2) attorney's fees have almost never been awarded although such an award might be one of the appropriate "terms or conditions" authorized by the Rule). The reason is that a plaintiff must remain free to accept or reject an order of dismissal containing conditions to which he has not agreed. *Lau v. Glendora Unified School District*, 792 F.2d 929 (9th Cir. 1986)(per curiam), holding reaffirmed in *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 554-55 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 85 (1987). In *Lau* the court stated that the plaintiff has

> a reasonable period of time within which [either] to refuse the conditional voluntary dismissal by withdrawing [the] motion for dismissal or to accept the dismissal despite the imposition of conditions.

792 F.2d at 931.

In an earlier case, even the Fourth Circuit acknowledged that where a plaintiff applied for a dismissal *without* prejudice, the district court may not order a

dismissal *with* prejudice. *Andes v. Versant Corp.*, 788 F.2d 1033 (4th Cir. 1986). In reversing, the court of appeals stated:

> It upsets notions of fundamental fairness for a court, in response to a party's request for dismissal without prejudice, to grant the request by dismissing *with* prejudice, while failing to give the moving party notice of its inclination to impose this extreme remedy. The plaintiff here deserved such notice and an opportunity to proceed with the litigation of this case.

788 F.2d at 1037.

In accordance with the principles set forth above, it has become the general practice for defendants wishing to preserve their right to move for Rule 11 sanctions or for attorney's fees to respond to a Rule 41(a)(2) motion with an appropriate cross-motion. *E.g., Greenberg v. Hilton Int'l. Co.*, 870 F.2d 926, 932-33, *reh'g granted rem'd on other grounds*, 875 F.2d 39 (2nd Cir. 1989); *Kya-Hill v. Davidson*, No. 87 CIV. 7802 (JES) (S.D.N.Y. Oct. 12, 1988 (twenty days granted in which to file Rule 11 motion after court-ordered dismissal);[7] *Dooley v. International Paper, Inc.*, No. 83 CIV. 6070 (SWK) (S.D.N.Y. Feb. 29, 1984) (thirty days granted in which to file Rule 11 motion after court-ordered dismissal). Contrariwise, Rule 11 motions filed after a Rule 41(a)(2) dismissal without a reservation of rights have been routinely denied. *E.g., Roe v. Operation Rescue*, No. 88-5157 (E.D. Pa., June 19, 1989); *Feldman v. Village of Lombard*, No. 86 C 3295 (N.D. Ill. 1987) (consent, as in this case, to 41(a)(2) dismissal without

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[7] All unreported decisions may be found in Lexis, GenFed, Courts.

reservation held to waive right to seek Rule 11 sanctions.)[8]

If the defendants in this case, in consenting to a dismissal with prejudice, had communicated to plaintiffs' attorneys an intention to seek Rule 11 sanctions after dismissal, or if the district court had reserved such a right to defendants as a term or condition of the dismissal order, then plaintiffs would have been in a position to reconsider their decision to dismiss. Indeed after the Rule 11 motions were filed counsel for the plaintiffs had filed affidavits stating that they would not have dismissed but would have litigated if they had been told that a Rule 11 motion was contemplated. Counsel were blindsided, just as counsel for a defendant in a civil rights lawsuit would be blindsided if after a settlement and a consented to dismissal under Rule 41(a)(2), the plaintiff's counsel applied for counsel fees under 42 U.S.C. §1988. The "fundamental unfairness" of this procedure should be corrected by this Court. If not, the decision below will inject confusion into what has become a useful and widely accepted accommodation between the rights of plaintiffs and defendants where Rule 11 and Rule 41(a)(2) intermesh.

B. DUE PROCESS AND RULE 56 MANDATE THAT FINDINGS UNDER RULE 11 OF IMPROPER PURPOSE, INADEQUATE FACTUAL INVESTIGATION, OR LACK OF

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[8] The circumstances are comparable to those in *Evans v. Jeff D*, 475 U.S. 717, 726 (1986), holding that a district court may not modify the terms of a settlement negotiated between the parties in a class action under Rule 23(e) by striking a waiver of costs and attorney's fees and otherwise approving the settlement. *Cf. Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985) (plaintiff may not reopen case to challenge fee waiver in stipulated consent decree). "A defendant in a civil rights case, as in other actions, is entitled to know, *at the time of settlement*, the full implications of that settlement including the total out of pocket cost." 757 F.2d at 439 (emphasis in original).

SOUND LEGAL BASIS FOR THE SUIT MAY NOT BE MADE SOLELY ON THE BASIS OF AFFIDAVITS WITHOUT AN EVIDENTIARY HEARING WHERE THE AFFIDAVITS SET FORTH SHARPLY CONFLICTING VERSIONS OF CRUCIAL FACTS AND QUESTIONS OF CREDIBILITY ARE PRESENTED AND WHERE THE COURT HAS NO PRIOR JUDICIALLY ACQUIRED KNOWLEDGE OF THE SUBSTANCE OF THE CASE.

It is unquestioned that proceedings under Rule 11 are subject to constitutional requirements of due process. As stated in the leading case of *Oliveri v. Thompson*, 803 F.2d 1265 (2nd Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987):

> Courts should be sensitive to the impact of sanctions on attorneys. They can be economically punishing, as well as professionally harmful; due process must be afforded.

803 F.2d at 1280. *Accord, Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir. 1987) (in banc opinion) (attorneys and clients facing possible discipline under Rule 11 have interests qualifying for protection under the Due Process Clause of the Fifth Amendment). While due process requires, at a minimum, notice and an opportunity to be heard, it does not necessarily mean that an evidentiary hearing must be held. As stated in the Advisory Committee Note accompany Rule 11:

> In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be needed.

This comment is quoted in a number of Rule 11 opinions, *e.g., Oliveri v. Thompson, supra,* at 1280; *Donaldson v.*

Clark, supra, at 1562.[9]

The present case is not a typical Rule 11 case. The judge had not participated in any proceedings prior to the Rule 11 motion. He had stayed all discovery by plaintiffs without explanation. He had not held any hearings on the defendants' motions to dismiss and for summary judgment. He had signed without comment or modification the consent dismissal order set before him. Thus he entered the Rule 11 proceeding without any prior knowledge of the case. Yet in his opinion he plunged directly into the third prong of Rule 11, - improper purpose - without prior consideration of the first and second prongs - whether the complaint was well-grounded in fact and law -[10], and proceeded to find, on the basis of speculative inferences and despite conflicting affidavits, that petitioner had filed the complaint with an improper purpose. Only then did he take up the question whether the complaint was well grounded in fact and law, as to which he ruled against petitioner.

A number of cases have noted that where Rule 11 sanctions are based on bad faith rather than an unfounded complaint or motion, or questions of credibility are involved, due process does require an evidentiary hearing.

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[9] The court in *Donaldson* noted that the court frequently may be able to evaluate the Rule 11 issue in the course of examining and ruling on the factual and legal merits of a motion to dismiss or for summary judgment without any further proceedings. *Id.* at 1561, n.13.

[10] This order of determination was criticized by the court of appeals, App. A at 21a, presumably for the reason that a complaint that is well grounded in fact and law does not violate Rule 11 even if it is filed for purposes of harassment or other "bad" motives. *E.g., Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1988).

Invst Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 405 (6th Cir. 1987); *Brown v. National Bd. of Medical Examiners*, 800 F.2d 168, 173 (7th Cir. 1986); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 206; *cf. Donaldson v. Clark, supra*, 819 F.2d at 1561 (risk of erroneous imposition of sanctions under limited procedures when court asked to resolve an issue of credibility).

No precedent holds that a court may rule on a lawyer's motivation in filing a complaint without hearing testimony, permitting cross-examination and determining credibility when confronted with conflicting affidavits as to the facts.

A single example will illustrate the fallacy of this procedure. The injunction which the plaintiffs sought against prosecution of the state indictment against Hatcher and Jacobs was based not only on a legal claim of double jeopardy but on the factual claim that the state prosecution violated the agreement with the Governor pursuant to which Hatcher and Jacobs had surrendered to the federal authorities. This claim, which was disputed by the defendants, presented a sharp factual issue which could not be properly determined without an evidentiary hearing, particularly in light of the fact that the district court had stayed all discovery. But without a determination of this issue, or at least an assessment of the evidence supporting the claim, how could the district court properly find that the claim had been made with an improper purpose?

Suppose that in this case the district court had endorsed on the dismissal order a condition reserving the defendants' right to move for Rule 11 sanctions, as it had the discretion to do, and that the plaintiffs had then withdrawn their motion, as they had the right to do. The case would then have proceeded to a hearing on the defendants' summary judgment motion. Could the court then have decided the conflicting factual issues contained in opposing affidavits and granted summary judgment in

defendants' favor without allowing testimony and cross-examination? This would be an unthinkable deprivation of due process rights as well as rights under Rule 56. Are attorneys in a Rule 11 proceeding, in which sanctions may not only subject them to a large financial loss but seriously damage their professional reputation, to have less Fifth Amendment and Rule 56 protection against unfounded summary judgments than ordinary citizens?[11] Rule 56 may very well have to be molded to apply to proceedings under Rule 11, but its fundamental postulate that summary judgment is not available when there are contested issues of fact is just as applicable to Rule 11 proceedings as to the underlying proceedings.

We submit that it is quite remarkable that the Court of Appeals sustained the lower court's ruling denying an evidentiary hearing after it concluded that

> The number of credibility findings which the Court made without an evidentiary hearing should have suggested to the Court that an evidentiary hearing would have been of value.
> *Supra*, p. 7.

The suggestion of the Court of Appeals that the issue which might have required a hearing went only to the question of purpose ignores the fact that equally contested issues related to the findings of inadequate factual inquiry, and that the complaint was not well grounded in law or a good faith argument for extension, modification, or reversal of existing law.

Indeed, the panel's opinion because it ignored the

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[11] Rule 56 on its face applies to any party seeking to recover on a claim. This would seem to encompass claims under Rule 11 and in this case it can hardly be said "that there is no genuine issue as to any material facts."

need for a hearing is a caricature of the record as to whether the complaint was well grounded in fact and whether the attorneys had made a reasonable investigation. It is undisputed that Messrs. Nakell and Pitts were entirely steeped in the facts of the case and had made a thorough investigation. The papers filed in response to the claim that their pleading had no basis in fact included a massive collection of affidavits, correspondence, court papers, and materials showing the political efforts to rid the county of the Sheriff, and the blatant efforts of officialdom to interfere with those efforts.

The question whether the Governor, through his aides, had indicated, explicitly or implicitly a "no Robeson County prosecution" understanding to Mr. Hatcher during the course of the negotiations was an important factual issue, Mr. Hatcher contending there was such an understanding, the Attorney General for the Governor's office contending there was not. It is obvious that the only way to resolve this conflict was for the plaintiffs to proceed to discovery of all members of the Governor's staff, the Attorney General and his staff, and all political figures who had dealt with Hatcher in negotiations who would have any information with respect to this matter. Discovery, however, was prevented by the Court.

The Court of Appeals finds "no factual or legal basis for the double jeopardy claim," citing *Heath v. Alabama*, 474 U.S. 82 (1985). It then acknowledges that there is a "tool of the same authorities exception," citing *Bartkus v. Illinois*, 359 U.S. 121 (1959). The Court of Appeals was convinced, however, by allegations in the complaint that no such circumstances exist in this case.

What kind of responsible lawyer is it who would not make a claim and try by discovery to establish a nexus between State and Federal Prosecutors? Is not this exactly the kind of "creativity" and enthusiasm which Rule 11 is not supposed to throttle?

The Court's finding that *Younger v. Harris*, 401 U.S. 37 (1971), barred injunctive relief in this case is based on the Court's statement that "we agree that plaintiffs had no factual basis for claiming that the State prosecution was brought in bad faith." How can the Court say that when Hatcher's counsel had been denied any opportunity to explore by discovery the content of the complex negotiations between Hatcher and the various State officials and politicians to whom he had spoken and the communications they had among themselves?

This Court has not heretofore addressed the question how much process is due to a respondent o a Rule 11 motion. The seriousness of this issue is revealed in this case where the Court acted without any appropriate fact finding procedure to protect the constitutional rights of the petitioner to due process. It is clear that the due process question or the Rule 56 principle as presented by this case are important questions which should be settled by this Court.

In the very recent case of *Jones v. Pittsburgh National Corporation*, 800 F. 2d 1350 (3rd Cir. 1990) the court dealt with what was encompassed within the right to respond in a Rule 11 proceeding said the Court. Said the Court:

> Given the permutations inherent in fee applications and response thereto, any rigid rule would, to say the least, be undesirable. The circumstances must dictate what is required. In some cases an oral response may be sufficient, while in others an opportunity to file a written response must be accorded. However, it does not follow, in either case, that further proceedings are automatically unnecessary. *See Donaldson v. Clark*, 819 F.2d 1551, 1560-61 (11th Cir. 1987) (en banc). Rather, we think a district court in the exercise of its sound discretion must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution requires

> further proceedings, including the need for an evidentiary hearing. *See Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53-54 (2d Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S. Ct. 1373, 94 L.Ed.2d 689 (1987); G. Joseph, Sanctions: The Federal Law of Litigation Abuse §17(d) (2)(1989).
>
> We believe the rule that we have announced has several factors to commend it. It gives the judge flexibility in deciding on the sound course to pursue. Thus, it permits some cases to be disposed of on the record and, to that extent, prevents unnecessary expenditure of judicial time. In other situations it mandates an evidentiary hearing to resolve disputes of material fact when the cold record may not disclose the full story, as here.

899 F.2d at 1358-59.

The position of the 3rd Circuit in Jones is clearly in conflict with that of the 4th Circuit as enunciated and applied in this case. Thus there is an additional basis for the court's granting this petition so as to resolve a conflict among the circuits.

CONCLUSION

For the reasons stated, petitioners respectfully request that this petition be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2815

In RE: WILLIAM M. KUNSTLER; In Re: BARRY NAKELL; In Re: LEWIS PITTS,

Appellants,

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK; ELEANOR JACOBS; BETTY MCKELLAR; EDDIE HATCHER; TIMOTHY BRYAN JACOBS,

Plaintiffs,

versus

JOE FREEMAN BRITT; RICHARD TOWNSEND; LEE SAMPSON; HUBERT STONE; LACY THORNBURG; ROBERT MORGAN; JAMES BOWMAN; SBI DOE, I; SBI DOE, II; SBI DOE, III; DEPUTY SHERIFF DOE, I; DEPUTY SHERIFF DOE, II; DEPUTY SHERIFF DOE, III; DEPUTY SHERIFF DOE, IV; DEPUTY SHERIFF DOE, V; DA DOE, I; DA DOE, II; DA DOE, III; ROBESON COUNTY;,

Defendants - Appellees,

THE NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS; NORTH CAROLINA CIVIL LIBERTIES UNION;

NORTH CAROLINA ACADEMY OF TRIAL LAWYERS; NATIONAL LAWYERS' GUILD, North Carolina Chapter,

Amici Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Malcolm J. Howard. District Judge. (CA-89-6-3-CIV-H)

Argued: June 5, 1990 Decided: September 18, 1990

Before CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

Affirmed in part, vacated in part and remanded with instructions by published opinion. Judge Chapman wrote the opinion, in which Judge Wilkinson and Judge Wilkins joined.

ARGUED: Morton Stavis, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York, for Appellants. David Roy Blackwell, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. ON BRIEF: George Cochran, Law Center, University, Mississippi; Jerold Solovy, Laura Kaster, JENNER & BLOCK, Chicago, Illinois, for Appellants. Lacy

H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Steven C. Lawrence, ANDERSON, BROADFOOT, JOHNSON & PITTMAN, Fayetteville, North Carolina, for Appellees. Jonathan D. Sasser, MOORE & VAN ALLEN, Durham, North Carolina; Martha A. Geer, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Amici Curiae North Carolina Civil Liberties Union, The North Carolina Academy of Trial lawyers, and The North Carolina Association of Black Lawyers. J. Phillip Griffin, Jr., Durham, North Carolina; Sherri Zann Rosenthal, Durham, North Carolina; Katherine A. Hermes, Law Student, Durham, North Carolina, for Amicus Curiae North Carolina Chapter of the National Lawyers Guild. Daniel J. Popeo, Richard A. Samp, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Amici Curiae The Washington Legal Foundation, U.S. Senator Jesse Helms, U.S. Representatives Howard Coble and J. Alex McMillan, and The Allied Educational Foundation.

CHAPMAN, Circuit Judge:

Three attorneys appeal the award of Rule 11 sanctions against them in the amount of $122,834.28. Appellants were sanctioned following the dismissal of a 42 U.S.C. § 1983 action, in which they represented certain plaintiffs seeking monetary damages and injunctive relief from the Governor of North Carolina, a number of North Carolina district attorneys, a sheriff, certain State Bureau of Investigation officers, the State Attorney General and others for an allegedly improper state criminal prosecution and harassment. We affirm in part, vacate in part, and remand with instructions.

I

The appellant attorneys are Barry Nakell, a professor at the University of North Carolina School of Law; Lewis Pitts, Director of the Christic Institute South, a public interest law firm in Carrboro, North Carolina; and William Kunstler, a nationally known civil rights attorney. The § 1983 action was connected with the appellants' earlier representation of two American Indians, Eddie Hatcher and Timothy Jacobs, in a federal criminal case.

On February 1, 1988, Hatcher and Jacobs staged an armed takeover of The Robesonian, a local newspaper in Robeson County, North Carolina. Hatcher and Jacobs held twenty hostages and charged the State District Attorney and the Sheriff's Office with corruption and criminal misconduct. Hatcher and Jacobs surrendered to federal authorities in exchange for a promise that a Governor's Task Force would investigate their complaints. The Task Force ultimately announced that it had found no evidence to support Hatcher's and Jacobs' charges.

Hatcher and Jacobs were acquitted of federal criminal charges on October 14, 1988, but North Carolina District Attorney Joe Freeman Britt announced that Hatcher and Jacobs might face state indictments. Soon after that announcement, Hatcher began a petition drive seeking to have Hubert and Kevin Stone removed from the Sheriff's Office. The Robeson Defense Committee, which had supported Hatcher in his federal trial, supported the petition drive. In November 1988, newspaper reports indicated that the State Bureau of Investigation (SBI) was investigating whether there had been a conspiracy in the takeover of The Robesonian.

Appellants Barry nakell and Lewis Pitts contacted the Attorney General's office to express their concern that SBI

agents would intimidate citizens who were working with Hatcher in the petition drive. The Attorney General responded that no action would be taken by his office because he did not believe that the SBI was engaged in any abuse of process. Attorney Nakell alleges that the Deputy Attorney General orally admitted that the decision was political.

Attorney Pitts volunteered legal assistance to anyone on the Robeson Defense Committee subjected to harassment because of their participation in the petition drive. Appellants allege that six members of the Defense Committee contacted Attorneys Pitts and Nakell with claims of harassment by SBI agents and the Sheriff's Department, primarily involving surveillance and questioning.

On December 6, 1988, Hatcher and Jacobs were indicted on state charges. After the indictment, Jacobs fought extradition from New York. Hatcher was in federal custody in California.

By late December 1988, appellants contend that they believed that Jacobs' extradition, the pending state prosecutions, and an alleged pattern of activity by the District Attorney on his staff, members of the Sheriff's Department, and the SBI raised constitutional concerns which could only be resolved by a civil suit, because public officials were unresponsive. Appellants contend that they also believed that there was an illegal campaign to split Jacobs from Hatcher, and to interfere with Jacobs' right to counsel by persuading him to hire local counsel.

Attorney Pitts and Nakell contend that they initially refrained from filing the complaint in hopes of enhancing Jacobs' plea bargaining opportunities, but Mr. Nakell filed the complaint on January 31, 1989, the eve of the one-year anniversary of the armed takeover of The Robesonian, and

he called a press conference to announce the filing. An amended complaint, signed by all three appellants, was filed on March 16, 1989.

The suit named eight plaintiffs, including various members of the Robeson Defense Committee, and Jacobs and Hatcher. The thirty-page amended complaint names nineteen defendants, including two district attorneys and members of their staffs, five SBI agents, the SBI Director, the Sheriff of Robeson County and five Deputy Sheriffs, the Attorney General of North Carolina, and the Governor of North Carolina. The complaint alleges First Amendment and Sixth Amendment violations concerning an alleged campaign of intimidation of political activity, and efforts to induce Jacobs to testify against Hatcher. All defendants were sued in their official and individual capacities, except the Governor, who was named only in his official capacity in a count seeking an injunction against extradition. The complaint also sought injunctions against the pending state criminal prosecutions, and against the defendants' harassment and interference with the attorney-client relationship established by Jacobs. The complaint sought damages against all individually named defendants and Robeson County.

After the case was filed, appellants sought expedited discovery to depose defendant SBI agent Bowman, who was the case agent in the state's pending criminal action against Jacobs and Hatcher. The defendants moved for a protective order claiming that discovery was improperly sought to obtain information concerning the state criminal proceedings, which plaintiffs could not otherwise obtain. The district court did not rule on this motion prior to the dismissal of the case. In late March 1989, Jacobs, having failed in resisting extradition, was returned to North Carolina. In April, Jacobs agreed to a plea bargain. Appellants contend that a variety of events then caused them to reevaluate the

viability of their civil suit, and to conclude that dismissal was appropriate.

On April 20, Mr. Nakell called Joan Byers, a Special Deputy Attorney General, seeking defendants' approval to a stipulated dismissal under Rule 42(a)(1)(ii). Byers would not stipulate to a dismissal under Rule 41(a)(1), but authorized appellants to state that defendants did not object to a dismissal under Rule 42(a)(2). Appellants proceeded under Rule 42(a)(2), and the order dismissing the case was entered on May 2, 1989.

On June 13, 1989, the state defendants filed their Rule 11 motion, and the county defendants filed a similar motion for sanctions on July 5. On August 8, appellants responded to the Rule 11 motions and requested an evidentiary hearing. On September 5, appellants filed a Rule 11 motion seeking sanctions against the appellees. On September 8, the court heard arguments of counsel and shortly thereafter requested submissions by defendants' counsel of their fees and expenses. On September 29, the district court imposed Rule 11 sanctions upon appellants, and dismissed appellants' Rule 11 motion. Sanctions against appellants included full fees and costs of $92,834.28 and $10,000 additional sanctions against each appellant based upon the baseless claims which appellants had taken care to publicize. We affirm the district court's findings that appellants violated all three prongs of Rule 11, but vacate and remand for reconsideration of the appropriate sanction.

II
SANCTIONS AFTER DISMISSAL

Initially, we must determine whether the defendants' failure to notify the plaintiffs or the court prior to dismissal that defendants intended to file a Rule 11 motion should

have precluded consideration of the Rule 11 motion. Appellants cite Barr Labs., Inc. v. Abbott Labs., 867 F.2d 743 (2d Cir. 1989), where the Second Circuit affirmed the denial of a Rule 11 motion filed after a stipulated dismissal under Rule 41(a)(1)(ii). There, the defendant's attorney did not indicate an intention to seek Rule 11 sanctions prior to dismissal and implied in a letter to plaintiff's counsel, prior to the dismissal, that sanctions would not be sought if the case were voluntarily dismissed. The Barr court enunciated a rule "prohibit[ing] a motion for Rule 11 sanctions after the execution of a stipulation of dismissal without a reservation of the right to move for such relief." 867 F.2d at 748.

The present case is different from Barr because it does not involve a stipulated dismissal, which requires opposing counsel to sign the dismissal order. We have a dismissal under Rule 41(a)(2), which does not require a stipulation by the defendants. No court has adopted a rule prohibiting a motion for Rule 11 sanctions after a dismissal with prejudice under Rule 41(a)(2). In addition, unlike Barr, there is no evidence that defendants indicated that they would not pursue Rule 11 sanctions. We decline to extend Barr to dismissals under Rule 41(a)(2).

Appellants also argue that since Rule 42(a)(2) specifies that dismissal is subject to such "terms and conditions as the court deems proper," the potential for Rule 11 sanctions should be stated by a defendant as a condition to a dismissal. We disagree. Rule 41(a)(2) does not require the defendant or a court to indicate the possibility of Rule 11 sanctions as a "term or condition" of a plaintiff's dismissal. Recently, in Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2456 (1990), the Supreme Court hypothesized that even a Rule 11 sanction which prohibited refiling a complaint dismissed without prejudice under Rule 41(a)(1) would not be a "term or condition" placed upon the dismissal. Waiver of a Rule 11 motion may not be a condition to dismissal

because a decision not to dismiss may not prevent the imposition of sanctions for an improvidently filed complaint. "As the 'violation of Rule 11 is complete when the paper is filed,' a voluntary dismissal does not expunge the Rule 11 violation." Id. at 2455 (quoting Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987), cert dismissed, 485 U.S. 901 (1988).

There may be circumstances under which Rule 11 sanctions should not be granted after the voluntary dismissal of a case, i.e., a defendant has indicated an intent not to pursue sanctions, or the motion is filed an inordinately long time after the dismissal. "Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate there would be a lengthy delay prior to their imposition." Hartmarx Corp., 110 S.Ct. at 2457. However, these considerations are equitable, and must be resolved on a case by case analysis. The party seeking sanctions may avoid such problems by notifying his opponent and the court of his intention to pursue sanctions at the earliest possible date.

As the Supreme Court has recently confirmed, there is no jurisdictional bar to the imposition of sanctions after a voluntary dismissal.

> In order to comply with Rule 11's requirement that a court "shall" impose sanctions "[i]f a pleading, motion, or other papers is signed in violation of this rule," a court must have the authority to consider whether there has been a violation of the signing requirement regardless of the dismissal of the underlying action.

Hartmarx Corp., 110 S.Ct. at 2455. "[T]he only time limitation . . . [in filing Rule 11] arises out of . . . equitable considerations." Hicks v. Southern Maryland Health Systems

AGency, 805 F.2d 1165, 1167 (4th Cir. 1986). The defendants filed their motion six weeks after the Rule 41(a)(2) dismissal, the appellants were not prejudiced by appellees' delay in filing, and the district court's consideration of the motion was proper.

III
VIOLATIONS OF RULE 11

Rule 11 states, in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase int eh cost of litigation. . . .If a pleading, motion, or other papers is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper,s including a reasonable attorney's fee.

The district court found that the three appellants violated all three prongs of Rule 11 by failing to make a reasonable inquiry to determine that complaint stood well grounded in fact and warranted by existing law, and by filing the complaint for an improper purpose. We review all aspects of the district court's Rule 11 determinations under an abuse-of-discretion standard. Cooter & Gell v. Hartmarx Corp. 110 S.Ct. at 2460; Stevens v. Lawyers Mut. Liab. Ins. Co. of North Carolina, 789 F.2d 1056, 1060 (4th Cir. 1986).

A. Mr. Kunstler's Liability

Before reviewing the specific violations of Rule 11 found by the district court, we note that Mr. Kunstler's affidavit states that he "did not actively participate in the instant litigation, relying on Prof. Barry Mr. Nakell, who wa son the scene, to prepare and file it." (Emphasis added.) The district court stated that "[i]n light of the serious allegations in the complaint, Mr. Kunstler's total reliance on other counsel is itself a violation of Rule 11." This finding is supported by a recent pronouncement of the Supreme Court. Mr. Kunstler's reliance on others was indeed an improper delegation of his responsibility under Rule 11 to certify that the pleading filed over his name was well grounded in fact and in law.

> The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment.

Pavelic & LeFlore v. Marvel Entertainment Group, 110 S.Ct. 456, 459 (1989).
[T]he purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility." Id. at 460. Having failed in his responsibility, Mr. Kunstler may not now be heard to protest that he does not share in any violations of Rule 11 which are evident on the face of the complaint.

B. Well Grounded in Fact

The district court based sanctions in part on a violation of the first prong of Rule 11 - finding that the complaint was not well grounded in fact. An objective test is used "to

determine the reasonableness of a lawyer's prefiling investigation." Stevens, supra, 789 F.2d at 1060. "Blind reliance on the client is seldom a sufficient inquiry." Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986). Mr. Nakell and Mr. Pitts have argued that they had "an intimate knowledge of the county and its people; factors which made them ... professionally capable of assimilating and weighing the facts gathered prior to filing the civil suit." In light of that knowledge, the factual inaccuracies in the complaint are even more egregious.

The district court noted numerous misstatements of fact, such as the assertion that the district attorney "serves as the criminal prosecution arm of Defendant Robeson County and as such makes policy in police investigation and criminal prosecution matters for Defendant Robeson County." In fact, N.C.G.S. §§ 7A-61 et seq. indicates that the District Attorney is an officer of the state, not an agent nor an employee of the county. Contrary to the complaint, defendants Britt, Townsend, and Sampson, and the District Attorney's staff, are state officers, not agents or employees of Robeson County.[1] The complaint alleges that District Attorney Britt refused and failed to discipline, train and supervise the Sheriff's deputies "under their control and supervision." District Attorneys possess no such power or responsibility.

Appellants acknowledge some errors, but contend they are "isolated" and thus do not warrant sanctions. We do not agree with this characterization. The errors pervade the complaint and concern information which either was or

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[1]Although the district court noted that appellant Pitts appeared to make similar misstatements in Waller v. Butkovich, 584 F. Supp. 909, 935 n.5 (M.D.N.C. 1984), it does not appear that counsel was sanctioned in that case, and we do not consider Pitts' conduct in Waller in affirming the award of sanctions in this case.

should have been known to appellants. The errors provide a false foundation for appellants' allegation of a county-wide "conspiracy," and are central to the complaint. Appellants also suggest that, under Pembaur v. Cincinnati, 475 U.S. 469, 484-85 (1986), state official can sometimes establish county policy for purposes of § 1983 liability. Unlike Pembaur, there is no provision of North Carolina law which suggests that the state officials in this case either could or did act to establish county policy.

Other causes of action were founded on allegations which utterly lacked any basis in fact. For example, the complaint alleged that the Governor, the Attorney General and District Attorney entered into a "no state prosecution" agreement, and this agreement was breached when the state prosecution commenced. The district court found that prior to filing their complaint, appellants

> had access to the transcript of the negotiations leading to the hostage release agreement as well as a copy of the written agreement. Nothing in the agreement . . . or in any of the negotiations, suggests an agreement that Hatcher and Jacobs would not fact North Carolina charges, and none of the negotiators had the authority to so agree.

Moreover, North Carolina law does not grant the Governor or the State Attorney General the power to bind the state not to prosecute. Neither the Attorney General nor District Attorney Britt played any role in the hostage negotiations, but appellants now argue that unspecified evidence, obtainable through discovery, "could show" that a no prosecution agreement was made. While a lawyer may rely on discovery to reveal additional facts to support claims which are well grounded in fact, Rule 11 sanctions are appropriate when a lawyer attempts to use discovery to support outrageous and frivolous claims for which there is

no factual support. Unsubstantiated claims such as these constitute an abuse of the judicial process for which Rule 11 sanctions were designed.

Appellants appear to have relied entirely upon discovery in the hope of finding some factual support for many of their claims. In their Memorandum and Opposition to Defendants' Motion for a Protective ORder, appellants wrote:

> Plaintiffs anticipate that as a result of [deposing SBI defendant Bowman] they will be in a position to apply to the Court for temporary injunctive relief and make the showing required by Rule 65(b) of the Federal Rules of Civil Procedure.

Appellants requested a temporary restraining order in their complaint. Rule 65(b) makes clear that a temporary restraining order may be granted only if

> it clearly appear from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

Rule 65(b) does not authorize counsel to request relief and then search through discovery for facts to support the relief already requested. The rule requires that "specific facts" be "shown" to the court with the request for relief. We agree with the district court that the appellants' request for relief and their indication that they were not "in a position to make the showing required by Rule 65(b)' without later discovery indicates an unacceptable level of pre-filing investigation.

We affirm the district court's findings that many of the allegations against state and local officials "have nothing to do with this case . . . and are factually unsubstantiated."

Allegations which suggest that the Sheriff is engaged in drug trafficking and that a black inmate died while in the Sheriff's custody are irrelevant. These allegations involve no injury to the plaintiffs, and the report of drug trafficking by the Sheriff's Office is wholly unsupported in fact. Appellants protest that these allegations were represented in the complaint only as beliefs of their clients, but this does not make them relevant to the complaint or less scandalous in nature. While irrelevant allegations, standing alone, may not be cause for Rule 11 sanctions, the existence of numerous irrelevant, unsubstantiated, and sensational allegations is an appropriate factor for a district court to consider in determining whether the pleading as a whole lacks adequate factual foundation.

In this case, the complaint was filled with irrelevant allegations not tied to specific injuries to plaintiffs, i.e., general allegations that Robeson County is beleaguered by poverty, illiteracy, and violence. There was little basis for the allegation that Britt, Townsend, Thornburg and Morgan conspired to appoint Townsend as District Attorney and to use SBI agents as political police to discredit the Republican candidate, and that allegation was again irrelevant. Hatcher and Jacobs had been indicted prior to Townsend's appointment, and none of the other candidates for District Attorney suggested that they would not continue the prosecution. Appellants' arguments as to the relevance of such allegations are tangential at best and often strain credulity.

Although Mr. Nakell and Mr. Pitts filed lengthy affidavits detailing their factual inquiry, such affidavits do not provide factual or legal support for the inaccuracies noted by the district court. The number of hours allegedly spent by counsel in pre-filing investigation does not dissuade us from affirming the district court's finding of Rule 11 violations. Given the adequate time to prepare and hours

allegedly spent in preparation of the complaint, appellants have presented no excuse for the many clear factual errors in this pleading.

Appellants have argued that, despite the lack of pre-filing foundation for their claims, it was appropriate to include the claims because support for them could only be obtained through discovery. In Kraemer v. Grant County, 892 F.2d 686 (7th Cir. 1990), the court held that sanctions were not warranted where an attorney relied on client information to support a cause of action based on a theory of conspiracy, even though additional facts were needed to prove the claim. "If discovery is necessary to establish a claim, then it is not unreasonable to file a complaint so as to obtain the right to conduct that discovery." 892 F.2d at 690. Despite this sweeping statement, there were in Kraemer a number of factors cautioning against sanctions which are not present here. In Kraemer, the attorney was a recent law school graduate, and had hired a private investigator to look into his client's allegations. The investigator's report did not discredit any part of the client's story and the prospective defendants refused to cooperate with the investigator. Only a single portion of the complaint - that dealing with the proof of state action - was ultimately found to be without support.

In the present case, appellants are experienced attorneys with both the time and the means to conduct a responsible factual investigation. The complaint contains myriad inaccuracies rather than a single error. Many of the factual inaccuracies could have been discovered by the most cursory investigation. The irrelevances are inexcusable considering the attorneys' experience. Indeed, it is remarkable that so many errors could have been undetected by appellants. The number of claims without factual foundation warrants sanctions, whether the errors stem from incompetency or wilful misconduct.

The need for discovery to complete the factual basis for alleged claims is not an excuse to allege claims with no factual basis. While we do not disagree with the result obtained in Kraemer, we find that it is not applicable to the present case. A lawyer is an officer of the court, and he should never file a lawsuit without confidence that it has a reasonable basis in fact and is well grounded in law. For the purposes of Rule 11, the factual inquiry necessary to file a complaint is generally satisfied if all of the information which can be obtained prior to suit supports the allegations made, even though further facts must be obtained through discovery to finally prove the claim. However, a complaint containing allegations unsupported by any information obtained prior to filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to sanctions.

C. Well Grounded In Law

The district court found that the complaint was not well grounded in law. We agree. Appellants contend that the strength of the legal basis of the complaint is demonstrated by their opponent's lengthy response to them, and the approval of a civil rights attorney, who reviewed and approved of, but did not sign, the complaint. The length of an opponent's response to a complaint does not validate the otherwise insubstantial claims therein, because a lengthy response may reveal less the merit of particular claims than the number of valid defenses to them. An opponent may have employed "scorched earth" tactics in composing a response far beyond what is required to oppose frivolous claims. Nor is the Rule 11 standard of whether a "reasonable attorney in like circumstances would believe his actions to be factually and legally justified" satisfied merely by having another attorney review a complaint. The reviewing attorney may be unfamiliar with the true facts of

the case, the factual and legal investigation conducted, or the law relevant to the complaint.

The district court enumerated several substantial claims without legal foundation. The court found no factual or legal basis for the double jeopardy claim to the state prosecution of Hatcher and Jacobs following the federal prosecution, because a subsequent prosecution by a different sovereign plainly does not constitute double jeopardy. See Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433 (1985). Although a "tool of the same authorities" exception is possible in some circumstances, see Bartkus v. Illinois, 359 U.S> 121 (1959), that exception may only be established by proof that State officials had little or no independent volition in their proceedings. See United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976). In this case, however, the complaint alleged that the state officials instituted and controlled the state proceeding, which precludes the establishment of that exception. The district court also considered a quotation attributed to Mr. Pitts in a newspaper article that the state charges did not constitute double jeopardy. Although we caution the court against relying too heavily on press reports, we do not fault the district court for considering the statement.

The district court found without legal foundation the

Pitts has never denied making the statement. If an attorney states that a particular claim is groundless, then that statement is strong evidence for the imposition of Rule 11 sanctions. However, a statement reported in the press should never be the basis for sanctions; rather, to be a basis for sanctions, the statement should appear either in an affidavit, in other reliable testimony, or in a statement by counsel in court. In this case, the reported statement was that the state charges did not "technically" constitute double jeopardy.

plaintiffs' claim that Hatcher's Fifth Amendment rights were damaged when the state tried to extract testimony from Jacobs. Fifth Amendment protection is personal to the individual whose testimony is being compelled and appellants as experienced attorneys should have been well aware of this. Moran v. Burbine, 475 U.S. 412, 433 (1986). Appellants make no attempt to explain away this glaring blunder.

Appellants sought to enjoin state criminal proceedings, but the district court found that the Younger v. Harris abstention doctrine clearly barred such relief. See Younger v. Harris, 401 U.S. 37 (1971). The court also found that Hatcher and Jacobs could have presented their federal constitutional claims to the state court. We agree that plaintiffs had no factual basis for claiming that the state prosecution was brought in bad faith, or without a reasonable expectation of conviction, because Hatcher and Jacobs had never denied taking hostages. Although appellants cite an Eighth Circuit case which suggests that the Younger abstention doctrine does not apply if "a prosecution was brought in realization for or to discourage the exercise of constitutional rights. . . 'regardless of whether valid convictions conceivably could be obtained,'" Lewellen v. Raff, 843 F.2d 1103, 1109-10 (8th Cir. 1988), cert. denied, 109 S.Ct. 1171 (1989), that proposition has been rejected by this court. In Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986), we upheld the use of the Younger abstention doctrine when plaintiffs claimed that their prosecution under obscenity laws chilled their First Amendment rights.

The district court also noted "serious standing problems with many of the plaintiffs' claims." For example, on the claim that the prosecution chilled Hatcher and Jacobs' First Amendment expression, the complaint presented no facts showing specific harm or threat of harm, as required by Laird v. Tatum, 408 U.S. 1 (1972). Appellants respond that

they did show concrete and specific harm insofar as plaintiffs' participation in the petition drive was curtailed. However, Hatcher and Jacob's participation was not curtailed, and the district court's observation on their standing problem with respect to that claim is valid.

We therefore affirm the court's finding that the complaint on the whole was not well grounded in law.

D. Improper Purpose

Sanctions could have been imposed for the violations already discussed, but the district court also based the award of sanctions on appellants' improper purpose in filing the complaint. The type and number of Rule 11 violations are considered in determining the appropriate sanction, and it was proper for the district court to consider appellants' purpose. Although the district court first discussed "improper purpose" under Rule 11, whether or not a pleading has a foundation in fact or is well grounded in law will often influence the determination of the signer's purpose, and we suggest that a district court should consider the first two prongs of Rule 11 before making a determination of improper purpose.

Appellants argue that the district court's conclusions as to their purpose are clearly erroneous, because there is no evidence in the record to support the court's findings, or the findings are based on factual conclusions which were contested by affidavit. The district court concluded that sanctions would be appropriate based on the improper purpose of the lawsuit "[e]ven if the complaint had a proper legal and factual basis." Since we have affirmed the court's findings that the complaint in the instant case was not well grounded in law or in fact, we need not decide whether a complaint which is well grounded in law and in fact can be sanctioned solely on the basis that it was filed for an

improper purpose. Rather, we look only to whether the court abused its discretion in finding that the complaint was filed for an improper purpose. But see Cohen v. Virginia Elec. and Power Co., 788 F.2d 247 (4th Cir. 1986) (A finding of improper purpose was appropriate where plaintiff had a preconceived plan to withdraw a motion, which was otherwise legally and factually supportable, if the opposing party resisted).

Rule 11 defines the term "improper purpose" to include factors "such as to harass or to cause unnecessary delay or needless increase in the costs of litigation." The factors mentioned in the rule are not exclusive. If a complaint is not filed to vindicate rights in court, its purpose must be improper. However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central sincere. Filing of excessive motions may sometimes constitute "harassment" under the rule even if the motions are well grounded. See Aetna Life Ins. Co. v. Alla Medical Serv., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988). Likewise, filing a motion or pleading without a sincere intent to pursue it will garner sanctions. See Cohen, supra.

We have previously stated that in order to determine "improper purpose," a district court must judge the conduct of counsel under an objective standard of reasonableness rather than assessing subjective intent. Stevens v. Lawyers mut. Liab. Ins. Co. of North Carolina, 789 F.2d 1056, 1060 (4th Cir. 1986); Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 210 (4th Cir. 1988). This test was derived from Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986), where it was stated that "[h]arrassment under Rule 11

focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent." In other words, it is not enough that the injured party subjectively believes that a lawsuit was brought to harass, or to focus negative publicity on the injured party; instead, such improper purposes must be derived from the motive of the signer in pursuing the suit. An opponent in a lawsuit, particularly a defendant, will nearly always subjectively feel that the lawsuit was brought for less than proper purposes; plaintiffs and defendants are not often on congenial terms at the time a suit is brought. However, a court must ignore evidence of the injured party's subjective beliefs and look for more objective evidence of the signer's purpose.

There is some paradox involved in this analysis, because it is appropriate to consider the signer's subjective beliefs to determine the singer's purpose in filing suit, if such beliefs are revealed through an admission that the signer knew that the motion or pleading was baseless but filed it nonetheless. This evidence may be said to be "objective" in the sense that it can be viewed by a court without fear of misinterpretation; it does not involve difficult determinations of credibility. Circumstantial facts surrounding the filing may also be considered as evidence of the signer's purpose. Repeated filings, the outrageous nature of the claims made, or a signer's experience in a particular area of law, under which baseless claims have been made, are all appropriate indicators of an improper purpose.

> The district court concluded that plaintiffs' counsel never intended to litigate this § 1983 action and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs.

The court drew its conclusions without the aid of an evidentiary hearing, but relied upon the evidence before it. The court's first conclusion, that counsel never intended to litigate the action, is the one which most clearly supports sanctions based on a finding of improper purpose. The fact that so many allegations in the complaint lacked a basis in law or in fact strongly supports the court's finding of improper purpose. The existence of baseless allegations does not alone require a finding of improper purpose, because inexperience or incompetence may have caused their inclusion in a pleading, rather than or in addition to willfulness or deliberate choice. See Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). However, in this case counsel are clearly not inexperienced, and the number and magnitude of claims without foundation suggests that incompetence is not the cause for such allegations in the complaint. This court is left with the conclusion, drawn by the district court, that counsel wilfully included the baseless claims. If counsel wilfully files a baseless complaint, a court may properly infer that it was filed either for purposes of harassment, or some purpose other than to vindicate rights through the judicial process. We therefore affirm the district court's finding that appellants violated the improper purpose prong of Rule 11.

In addition to relying upon the complaint itself, the district court inferred an improper purpose from the timing of the filing of the complaint, on the eve of the anniversary of the takeover of The Robesonian, and some time after the alleged constitutional violations began. The court also viewed with suspicion the timing and nature of the dismissal of the complaint, which occurred after Jacobs lost his extradition fight in the criminal case, and before any significant discovery might have given notice to the plaintiffs that their claims were not valid. The district court dismissed as incredible appellants' explanations for dismissal, which

contended that many of the claims had become moot through a series of events. The district court found it "absurd" to think that the wide-spread conspiracy involving high-level state and public officials had suddenly become unimportant by May 2, 1989. The court noted that the basis of the complaint - the breach of the alleged no-prosecution agreement - still existed even after Hatcher's and Jacobs' guilty pleas to the state charges. The court stated that the double jeopardy claims, damage claims, and other requests for equitable relief, if ever valid, did not cease being valid. In finding improper purpose, the district court was also influenced by the outrageous nature of the claims made.

The affidavits submitted by counsel strongly disputed the court's conclusions as to the timing of the filing and of the dismissal of the suit, and claimed that no improper motive influenced the timing of events. As to the decision to dismiss, appellants argued that it was based solely on financial considerations and the necessity of devoting professional resources elsewhere. Appellants argue that many equitable claims had become moot, and that the prospect for damages on the remaining claims did not warrant the expense of continuing the suit. However, the district court's determination that these explanations are not reasonable or believable, in light of all of the evidence surrounding the filing of the complaint and the frivolousness nature of the allegations made, is not clearly erroneous.

The district court noted other evidence which suggested that appellants' purpose in filing the complaint was not to vindicate plaintiffs' rights, such as appellants sending a copy of the complaint to the state judge who likely would have tried Hatcher and Jacobs in the criminal case. The court also noted a quotation reported by the media, in which Mr. Pitts allegedly suggested that the suit was dropped after the Attorney General's office showed strong opposition to the suit. The court further considered an affidavit by New York

attorney Neal Rose concerning Mr. Pitts' alleged admission that the suit was commenced as leverage and lacked a factual basis, although that affidavit was contradicted by an affidavit by attorney Alan Rosenthal. In light of other evidence which supports the court's finding of improper purpose, we cannot say that it was an abuse of discretion for the court to consider these matter as additional support, even though determinations of credibility are best made after an evidentiary hearing.

In concluding that appellants had never intended to litigate their suit, the district court also concluded that circumstances surrounding the case, when viewed as a whole, supported the conclusion that appellants' primary motives in filing the complaint were to gain publicity, to embarrass state and county officials, to gain leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs. At least some of these motives would not warrant sanctions under the improper purpose portion of Rule 11, if appellants' central purpose in bringing suit had been to vindicate rights of the plaintiffs. Holding a press conference to announce a lawsuit, while perhaps in poor taste, is not grounds for a Rule 11 sanction, nor is a subjective hope by a plaintiff that a lawsuit will embarrass or upset a defendant, so long as there is evidence that a plaintiff's central purpose in filing a complaint was to vindicate rights through the judicial process. In this case, however, there was no proper purpose for appellants' filing of the suit, and the district court's consideration of other possible motives for the suit based ont he evidence available was proper.

We have affirmed the district court's conclusion that sanctions were warranted based on the improper purpose prong of Rule 11 because it is not clearly erroneous and is supported by facts such as the baseless allegations made,

appellants' legal experience, and the cumulative nature of the evidence. However, we urge district courts to exercise special caution when evaluating a signer's purpose under Rule 11. When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purpose as well as failure to comply with the first two prongs of Rule 11. We do not find that the court erred in failing to hold an evidentiary hearing in this case, because the cumulative nature of the evidence, as well as our earlier findings on the frivolousness of the allegations made in the complaint and the lace of a legal or factual basis, convinces us that the court's finding of improper purpose is not clearly erroneous and would not have been altered by an evidentiary hearing.

IV
DUE PROCESS

Appellants argue that the district court should not have found a violation of the "improper purpose" prong of Rule 11 without holding an evidentiary hearing. We disagree. Due process does not require an evidentiary hearing before sanctions are imposed, even when sanctions are imposed in part under the improper purpose prong of Rule 11. The Advisory Committee Note on Rule 11, 28 U.S.C. App., pp. 575-76, indicates that satellite litigation over sanctions and separate hearings should be limited to the extent possible. "[T]he court must to the extent possible limit the scope of the sanction proceedings to the record."

Appellants cite two Seventh Circuit cases which suggest that a hearing should be held where sanctions are based on a signer's "bad faith." See Brown v. Nat'l. Bd. of Medical

Examiners, 800 F.2d 168, 173 (7th Cir. 1986); Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 206 (7th Cir. 1985). We are not persuaded by the scant reasoning of these cases that a hearing is required whenever improper purpose is found under Rule 11. Appellants also cite INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 9\391, 405 (6th Cir.), cert. denied, 108 S.Ct. 291 (1987). Although it cites Rodgers, Chem-Nuclear Systems does not support appellants' proposition. Instead, the court simply notes that

> no hearing is required where an attorney is sanctioned for filing frivolous motions ungrounded in law or fact, and where the judge imposing sanctions has participated in the proceedings. These are the circumstances in [this] case.

Id. Counsel was also sanctioned in that case for filing motions for an improper purpose.

In determining whether and to what extent a hearing is required prior to the imposition of sanctions, we are guided by the Advisory Committee Note to Rule 11 and the reasoning of Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987);

> The Advisory Committee Note indicates some of the matters to be considered: (1) the circumstances in general; (2) the type and severity of the sanction under consideration; and (3) the judge's participation in the proceedings, the judge's knowledge of the

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Brown cites only Rodgers for the proposition. Rodgers itself relies on Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387 97th Cir. 1983), a case which is based not on the current Rule 11, which relies on an objective standard of reasonableness, but on a wholly subjective test.

facts, and whether there is need for further inquiry. The Advisory Committee Note observes that "[i]n many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

When an attorney has failed to present necessary factual support for claims despite several opportunities to do so, for example, further hearing ont he sanctions of judicial resources. On the other hand, when a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater. Prior opportunities to respond to Rule 11 charges will also influence the extent to which further hearing is necessary.

As mentioned by the Advisory Committee, tho type and severity of the sanction are necessary elements in the calculus. The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due.

(Footnote omitted.)

Even if an evidentiary hearing is not required in every "improper purpose" case, appellants argue that such hearing was required in this case. Although the number of credibility determinations which the court made without an evidentiary hearing should have suggested to the court that an evidentiary hearing would have been of value, we affirm the court's findings that appellants violated all three prongs

of Rule 11 because the findings are not clearly erroneous even excluding some evidence of "improper motive" which appellants contested.

The district judge's participation in the proceedings was adequate to give him full knowledge of the relevant facts without the necessity of an evidentiary hearing. The district court had before it the pleadings, the summary judgement motions of the state defendants and the 12(b) motion of the county defendants. We also find that counsel were given an adequate opportunity to contest the court's determinations that Rule 11 was violated. The district court allowed appellants to submit affidavits, and voluminous written legal arguments. The district judge also heard oral argument. We find that due process requirements were satisfied by the opportunities appellants were given to respond to the charges that their complaint violated Rule 11.

However, although we find that counsel had an adequate opportunity to contest the court's finding that Rule 11 was violated, we find that appellants were not given an adequate opportunity to respond to the type and amount of sanction imposed, particularly in light of the large monetary sanction. Appellants were given no opportunity to contest the fee statements submitted, and the amount of the sanction was largely the result of those statements. Under the facts of this case, particularly the amount of the sanction, due process requires that appellants have some opportunity to contest the amount of the sanction imposed. We therefore vacate the sanction imposed. As discussed below, we vacate the type and amount of sanction chosen by the district court for certain additional reasons. On remand, under the guidelines set forth below the appellants will be given an appropriate opportunity to respond to the type and the amount of the sanction.

V
AMOUNT OF SANCTION

A. Attorney Fees Portion

Rule 11 requires that "an appropriate sanction" be imposed upon those who violate its requirements. Appellants argue that the amount of sanctions was inappropriate, in part because the district court used the Rule to shift fees and compensate the defendants, rather than to deter improper litigation. We agree and vacate the amount of the monetary sanction.

We have previously held that the least severe sanction adequate to serve the purposes of Rule 11 should be imposed. Cabell v. Petty, 810 F.2d 463, 466 (1987). It is clear that Rule 11 should not blindly be sued to shift fees. In this instance, it appears that the district court erred in assuming that "[t]he first purpose of sanctions under Rule 11 is to compensate the offended parties." In establishing the amount of the sanction, the district court improperly focused on providing "compensatory sanctions." The amount of expense borne by opposing counsel in combatting frivolous claims may well be an appropriate factor for a district court to consider in determining whether a monetary sanction should issue and if so, in what amount. However, it is clear that the primary, or "first" purpose of Rule 11 is to deter future litigation abuse. A district court can and should bear in mind that other purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets and facilitating court management. White v. General Motors Corp., ___ F.2d ___, 1990 WL 99472 (10th Cir. 1990); Hartmarx Corp., 118 S. Ct. at 2454-57. But the amount of a monetary sanction should always reflect the primary purpose of deterrence.

When a monetary award is issued, a district court should explain the basis for the sanction so a reviewing court may have a basis to determine whether the chosen sanction is appropriate. A district court should consider the four factors recently enumerated by the Tenth Circuit in White v. General Motors Corp., ___ F.2d ___: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation.

> 1) Reasonableness (lodestar) calculation. Because the sanction is generally to pay the opposing party's "reasonable expenses . . . including a reasonable attorney's fee," Fed.R.Civ.P. 11, incurred because of the improper behavior, determination of this amount is the usual first step. The plain language of the rule requires that the court independently analyze the reasonableness of the requested fees and expenses. The injured party has a duty to mitigate costs by not overstaffing overresearching or overdiscovering clearly meritless claims. In evaluating the reasonableness of the fee request, the district court should consider that the very frivolousness of the claim is what justifies the sanctions.

____F.2d at ____ (citations omitted).

Attorney time which is attributed to responding to the media, or to claims within a pleading which do not merit sanctions, should be excluded from consideration. Only attorney time which is in response to that which has been sanctioned should be evaluated. In this case, it is appropriate for the court to consider on remand whether the large amount of time devoted to the pursuit of sanctions was warranted, and whether the injured parties failed to mitigate their costs by delaying their pursuit of sanctions

until after the dismissal. It would also be appropriate for the district court to reduce the amount of any fees awarded based on appellees' failure to give earlier notice to appellants that their conduct warranted Rule 11 sanctions. See Advisory Committee Note. While the analysis of the reasonableness of costs may call for fairly detailed affidavits, this requirement is not intended to require evidentiary hearings.

Although amici curiae for appellants argue that sanctions based in whole or in part on attorney's fees require the same procedures of discovery, briefing, and argument allowed in attorney's fees cases, we have already stated that sanctions, unlike attorneys fees, are not primarily intended to compensate the prevailing party. Because the purposes of sanctions differ from those of attorney's fees, the amount of process due the offending party differs.

The determination of the type or amount of the sanction imposed comes only after the offending party has had an opportunity to defend against the imposition of any sanction.[4] Presumably, a party's interest in the kind and amount of a sanction is of less import than his or her interest in the decision to impose any sanction. As stated, a district court is required to choose the least severe sanction adequate to accomplish the purpose of Rule 11. Thus, a monetary sanction should never be based solely on the amount of attorney's fees in the context of Rule 11 "does not necessarily mean actual expenses and attorney's fee." Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 211 (4th Cir. 1988). Because the amount of a monetary sanction is

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[4]Appellants have already had this opportunity, and on the present record we are convinced that Rule 11 sanctions against the three appellants are not only proper, but they are required if the Rule is to have any meaning.

not based solely on any claimed amount of attorney's fees but rather on all of the factors listed herein, the risk of an erroneous calculation based on fee statements is less troublesome in the context of a Rule 11 sanction than in attorney's fees cases. We also bear in mind the interest in avoiding additional hearings for purposes of calculating the amount of fees in the context of Rule 11. See Advisory Committee Note. Given these considerations, we hold that a sanctioned party is not entitled to an evidentiary hearing or to all of the procedural safeguards available in the context of attorney's fees actions. Instead, a district court may permit a sanctioned party to respond to an opposing party's fee statements in its discretion. Of course, such discretion must be exercised with proper considerations of due process. Where a court determines that a large monetary sanction should discus, and the amount is heavily influenced by an injured party's fee statements, as was the case here, the court should permit the sanctioned party to examine and contest the injured party's fee statements as an aid to the court's own independent analysis of the reasonableness of the claimed fee.

> 2) Minimum to deter. As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. . . . [T]he amount of sanctions is appropriate only when it is the 'minimum that will serve to adequately deter the undesirable behavior.' . . . Thus, the limit of any sanction award should be that amount reasonably necessary to deter the

wrongdoer.

White, ___F.2d at ___ (citations omitted).

A district court must constantly bear in mind the limited purposes of Rule 11, particularly in a case such as this, where a court may disagree with aspects of counsel's conduct which fall outside of the scope of Rule 11. Of course, a court must also constantly bear in mind that the rule is not to chill the bringing of facially valid lawsuits, or a lawyer's creativity in introducing novel theories of recovery.

> 3. Ability to pay. The offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney and litigant misconduct. Because of their deterrent purpose, Rule 11 sanctions are analogous to punitive damages. It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages. . . . Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status.

White, ___ F.2d at ___ (citations omitted).

Although the burden is upon the parties being sanctioned to come forward with evidence of their financial status, a monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion. A court should refrain from imposing a monetary award so great that it will bankrupt the offending

parties or force them from the future practice of law. Generally, the smaller the amount of the monetary sanction imposed, the greater the likelihood that a court's consideration of the ability to pay will not want for lack of the formal submission of evidence on a sanctioned party's financial status. When the monetary sanction is large, however, the parties should generally be given the opportunity to submit affidavits on their financial status, or to submit such other evidence as the court's discretion permits. In this case, the amount of the monetary sanction originally imposed was substantial, and the parties should have been afforded the opportunity to submit evidence ont he issue of whether the amount imposed was so great as to unfairly restrict their access to the courts or to otherwise curtail their ability to practice law or to cause them great financial distress.

> 4. Other factors. In addition, the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. See [American Bar Association, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (1988), reprinted in 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, 212, 236-37 (Supp. 1989)].

In this case, it is appropriate for the court to consider counsel's vast experience, the outrageous and scandalous nature of the claims made, and the improper purpose of the lawsuit. A court might also increase a sanction if one attorney has been previously sanctioned, because such conduct might indicate that the previous sanction was not enough to deter the repetition of the offense.

In addition to the four factors just stated, a district court must sometimes consider whether joint and several liability is appropriate, such as where sanctions are to be imposed against both a client an his counsel. In this case, joint and several liability among attorneys, who each signed a complaint in violation of Rule 11, was not inappropriate. Under Pavelic & LeFlore v. Marvel Entertainment Group, each attorney has a duty to ensure that the pleading he has signed comports with Rule 11. Issues of individual culpability do not arise where each sanctioned party has committed the same Rule 11 violations.

B. Additional Sanctions

In addition to imposing sanctions in the amount of attorney's fees claimed by the defendants, the district court imposed sanctions in the amount of $10,000 upon each appellant based on his conduct in wilfully filing outrageous claims and appellants' "pains to publicize the allegations through the media." We believe this sanction was error. Rule 11 does not confine courts to any maximum monetary sanction, nor does it even require courts to restrict themselves to monetary penalties. However, Rule 11 must be accorded its plain meaning. The text of the Rule clearly pertains only to a "pleading, motion, or other paper." Rule 11 does not encompass all conduct within judicial proceedings, and it clearly does not reach conduct outside of the judicial process. Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987). In this case, it appears the court imposed sanctions in part based on appellants' publication of their baseless claims through the media. While such publication may not be actionable as libel or slander, and is reprehensible, Rule 11 was clearly not designed to encompass such conduct.

VI

Appellants' argument that the district court should have granted their own motion for sanctions against appellees is without merit. The denial was not an abuse of discretion.

VII
CONCLUSION

In sum, we affirm the findings of the district court which led to the imposition of Rule 11 sanctions in this case against plaintiffs' attorneys. However, we vacate the sanction imposed, because it was based on improper considerations and the size of the sanction required the district court to allow sanctioned counsel an opportunity to respond, at least to the fee statements on which the sanction was based. On remand, the district court should consider the factors which we have adopted prior to determining the sanction which should be imposed.

AFFIRMED IN PART, VACATED IN PART,

AND REMANDED WITH INSTRUCTIONS

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 89-06-CIV-3-H

ROBESON DEFENSE COMMITTEE, et al., CARNELL LOCKLEAR, MARY SANDERSON, THELMA CLARK, ELEANOR JACOBS, BETTY McKELLAR, EDDIE HATCHER, and TIMOTHY JACOBS,	)	
Plaintiffs,	)	ORDER
v.	)	
JOE FREEMAN BRITT, RICHARD TOWNSEND, LEE EDWARD SAMPSON, HUBERT STONE, LACY H. THORNBURG, ROBERT MORGAN, JAMES BOWMAN, JAMES G. MARTIN, SBI DOE I, SBI DOE II, SBI DOE III, DEPUTY SHERIFF DOE I, DEPUTY SHERIFF DOE II, DEPUTY SHERIFF DOE III, DEPUTY SHERIFF DOE IV, DEPUTY SHERIFF DOE V, DISTRICT ATTORNEY DOE I, DISTRICT ATTORNEY DOE II, DISTRICT ATTORNEY DOE III, ROBESON COUNTY, et al.,	)	
Defendants.	)	

This matter is before the court on the parties' cross-motions for sanctions pursuant to Fed. R. Civ. P. 11. Plaintiffs filed this civil rights action under 42 U.S.C. § 1983, alleging a deprivation of constitutional rights. Plaintiffs include the

Robeson Defense Committee, an unincorporated association, several Native-American and African-American residents of Robeson County, Eddie Hatcher, and Timothy Jacobs. Defendants include Governor Jim Martin, former District Attorney Joe Freeman Britt, District Attorney Richard Townsend, Attorney General Lacy Thornburg, Director of the State Bureau of Investigation Robert Morgan, state employee Lee Edward Sampson, and various John Doe State Bureau of Investigation agents and assistant district attorneys.

STATEMENT OF FACTS

This civil rights action arose out of the criminal proceedings that followed the armed takeover of the Robesonian newspaper by plaintiffs Hatcher and Jacobs. Hatcher and Jacobs were acquitted by a federal jury on federal charges stemming from the takeover. Their defense was that the takeover was necessary to gain protection and to have a forum to express their views that the local sheriff and district attorney offices were corrupt.

Hatcher and Jacobs were subsequently indicted by the State on State charges arising out of the Robesonian takeover. This State prosecution and the circumstances surrounding it allegedly formed the basis for plaintiffs § 1983 complaint. Plaintiffs asked for damages and an injunction of the STate criminal proceedings.

Plaintiffs filed the complaint on January 31, 1989 over the signature of Barry Nakell and filed an amended complaint on March 16, 1989 over the signature of Nakell, William Kunstler, and Lewis Pitts. Plaintiffs alleged, among other things, that Governor Martin, through his agents, negotiated an agreement with Hatcher and Jacobs that they would not be prosecuted by Robeson County law enforcement authorities. Plaintiffs allege that Governor Martin agreed with defendants Britt, Thornburg

and the U.S. Attorney's Office that Hatcher and Jacobs would be prosecuted by federal, not state, authorities. It is alleged that the State prosecution violates this agreement.

The complaint alleges that following the federal acquittal, the plaintiffs engaged in First Amendment activity in Robeson County in an effort to encourage political change. Plaintiffs allege that various defendants conspired to harass and intimidate plaintiffs to prevent them from engaging in these First Amendment activities.

Plaintiffs allege that various defendants interfered with Jacobs' Sixth Amendment rights by advising his family and friends that Jacobs should fire his New York counsel and retain local counsel and that Jacobs should voluntarily return to North Carolina to testify against Hatcher. Plaintiffs allege that these communications interfered with Jacobs' relationship with his counsel and his joint defense with Hatcher. Plaintiffs also allege that defendants attempted to coerce Jacobs into testifying in violation of Hatcher's Fifth Amendment rights. Plaintiffs assert finally that the subsequent State prosecution violated the Double Jeopardy Clause.

After defendants answered and filed a motion to dismiss, plaintiffs requested a voluntary dismissal with prejudice under Fed. R. Civ. P. 41(a)(2), which this court granted on May 2 1989. Defendants subsequently moved for Rule 11 sanctions based on the complaint and amended complaint; plaintiffs moved for Rule 11 sanctions based on defendants' Rule 11 motion. Plaintiffs also asked for discovery and an evidentiary hearing. The court, having been inundated with written materials[1] and having heard oral arguments, is now prepared

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[1]On the Rule 11 motion alone, the defendants have written 97 pages of memoranda, the plaintiffs 90. Each side has submitted several hundred pages of appendices. The previous filings in the

to rule on these motions and requests.

RULE 11

Rule 11 of the Federal Rules of Civil Procedure states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is signed in violation of this rule, the court, ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 has three prongs, the violation of any one of which justifies sanctions. First, any pleading signed by an attorney must not be interposed for any improper purpose. See NCNB Nat. Bank of North Carolina v. Tiller, 814 F.2d 931 (4th Cir. 1987). Second, a pleading must be warranted by existing law or a good faith argument for modification of existing law or a good faith argument for modification of

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case are of similar length.

existing law. See Cabell v. Petty, 810 F.2d 463 (4th Cir. 1987). Third, Rule 11 requires an attorney to make reasonable inquiry to determine that the pleading is well grounded in fact. See Fahrenz v. Meadow Farm Partnership, 850 F.2d 207 94th Cir. 1988). The court discusses in greater detail the development and purposes of Rule 11 in Barnett D. Plotkin, et al. v. Association of Eye Care Centers, Inc., et al., No. 88-87-CIV-5-H (E.D.N.C. September ___, 1989), in which this court today has denied a request for sanctions. Therefore, the court will not again address the development and purpose of Rule 11 in this order.

As a preliminary matter, plaintiffs argue that the dismissal of this action pursuant to Rule 41(a)(2) precludes the defendants from bringing the present Rule 11 motion. Plaintiffs argue that defendants did not reserve the right to file such a motion and that the court's dismissal contained no such reservation. This argument is without merit.

Nothing in the Rule states that a party loses the right to Rule 11 sanctions if he fails to reserve such a right as a condition to a Rule 41(a)(2) dismissal. The terms and conditions that may be imposed upon a voluntary dismissal are for the protection of the defendant. Wright & Miller, Federal Practice and Procedure: Civil § 2366 (1971 and Supp. 1988). A voluntary dismissal without prejudice allows a plaintiff to bring a later identical action. Therefore, it is the defendant's interests which are protected by conditions imposed in a Rule 41(a)(2) dismissal. LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 603 (5th Cir. 1976).

In this case, the court dismissed the plaintiffs' suit with prejudice. Such a dismissal constitutes a final judgment and bars the plaintiffs from bringing a second suit on the same cause of action. The need to protect the defendants' interest due to the possibility of a second suit is not present in this case. Nothing in Rule 41(a)(2) bars this Rule 11 motion.

Harris v. Marsh, 123 F.R.D. 204, 228-29 (E.D.N.C. 1988), citing Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1076-79 (7th Cir. 1987), cert. dismissed, ___ U.S. ___, 108 S.Ct. 1011, 99 L.Ed.2d 229 (1988).[2]

PLAINTIFFS BROUGHT THIS CIVIL ACTION FOR AN IMPROPER PURPOSE

The court addresses this prong first because it is greatly concerned with the motives of plaintiffs' attorneys and the manner in which they have conducted themselves. The activities of plaintiffs and their counsel, as well as the papers filed with the court, indicate that plaintiffs' attorneys initiated the § 1983 action not to vindicate constitutional rights, but more probably to gain publicity and to influence the State prosecution then underway against Hatcher and Jacobs.[3]

This action was filed on January 31, 1989, which is significant in that it was the day before the one-year anniversary of the Robesonian takeover. Moreover, counsel did not merely file the complaint, but followed it with a press conference on the Robeson County Courthouse steps. The voluntary dismissal was conducted with considerably less

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[2]Plaintiffs next argue that the defendants' Rule 11 motion is not timely in that it was filed two months after the dismissal. This argument is without merit. Hicks v. Southern Maryland Health Systems Agency, 805 F.2d 1165 (4th Cir. 1987) (in absence of local rule, the only time limitation arises out of equitable considerations that a district judge may weigh in his discretion).

[3]Plaintiffs' counsel asserts that asking for an injunction is a proper way to "interfere" with a pending state prosecution. The court agrees; however, the court finds improper purpose from conduct other than the mere filing of a request for injunctive relief.

fanfare.[4]

Plaintiffs assert that they filed the civil rights actio in response to harassment and intimidation directed towards them from October 14, 1988 to January 31, 1989. The complaint sought injunctive relief ordering termination of the harassment, termination of the prosecution, and termination of the State's communication with Jacobs and his family concerning his legal representation. However, plaintiffs waited through October, November, December, and January to file this complaint. This timing indicates that the motivation behind the complaint was not the vindication of constitutional rights. Mr. Pitts stated to the press after the dismissal:

> The relief we could have won would be, I think, very limited compared to the amount of resources that would have had to be plowed into it .... And we think there would be better ways of raising the issues of injustice and drug trafficking and deliberate indifference by public officials than by the suit.

Defendants' Memorandum, Exhibit 3 (undated Raleigh News and Observer article).

The question arises as to why plaintiffs' filed this suit. First, plaintiffs faced Jacobs' extradition hearings in New York the following month. The court finds that the civil action was instituted as leverage in these extradition proceedings. Neal

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[4]The court is aware that conducting a press conference is a First Amendment activity. The court is not imposing sanctions because of htis press conference. The court does not mean to indicate that it will impose Rule 11 sanctions on attorneys who speak to the press. However, the court believes that the press conference and what was said therein, considered in light of the surrounding circumstances, is evidence of improper purpose.

P. Rose, a New York District Attorney, has filed an affidavit with the court stating that Mr. Pitts offered to dismiss this civil action as part of the plea bargain and that Mr. Pitts admitted that the civil suit had been commenced as leverage and that it had no basis in fact. Defendants' Memorandum, Exhibit 2. In response, Mr. Pitts contends that he was concerned only with the negative consequences of the civil rights action as it related to the pending criminal prosecutions. Plaintiffs' Memorandum at 40. This contention is difficult to accept in light of the intentional publicity that plaintiffs gave this case. It would appear that had Mr. Pitts truly been concerned with the negative consequences of the § 1983 case, he would not have intentionally tweaked the state's nose in a press conference.

Second, the day the complaint was filed, Mr. Nakell wrote a letter to State Court Judge Anthony M. Brannon, who likely would have been the judge to try Hatcher and Jacobs, and enclosed a copy of the federal civil complaint. Defendants' Memorandum in Support of Motion for a Protective Order, Exhibit D. This somewhat astonishing conduct indicates that the motive behind the filing of the civil rights action was to influence Judge Brannon and other state and county officials.

Third, plaintiffs filed this action to obtain discovery otherwise unobtainable under North Carolina Criminal Procedure. By naming Bowman and Britt as defendants, plaintiffs could obtain discovery of the State's criminal investigatory files otherwise unavailable to them under North Carolina procedure. Shortly after filing the complaint, plaintiffs sought leave of court to depose Bowman, even though they had not yet served all of the defendants. Plaintiffs sought expedited discovery, not because it was necessary to pursue the civil action, but because normal discovery would not have helped them in Jacobs' upcoming extradition hearing in New York. Furthermore, at the press conference announcing the filing of the suit, Mr. Pitts stated

that "now we have the subpoena power ...," indicating that the action was filed to gain access to State Bureau of Investigation files, rather than to vindicate constitutional rights. After the extradition hearing, the suit was dropped.[5]

The most damning evidence of all, however, is the sudden and inexplicable voluntary dismissal with prejudice on May 2, 1989. Significantly, this dismissal occurred after Jacobs lost his extradition fight and returned to North Carolina and before any significant discovery or other event which would have given notice to the plaintiffs that their claims were not valid. Indeed, with Jacobs now back in North Carolina, he would have once again been subject to the unconstitutional conduct of the various defendants.

Plaintiffs state as a reason for the dismissal that the Sixth Amendment issues had become moot since Jacobs had received an acceptable plea bargain, and that the First Amendment objections were no longer important because the interference had stopped. Neither reason is credible if the true intent of plaintiffs was to vindicate constitutional rights. Plaintiffs alleged widespread First Amendment violations impacting on a number of persons. The mere fact that the conduct stopped does not moot those claims. Nor is it clear that Jacobs' Sixth Amendment claims are moot just because he retained other counsel. United States v. Smith, 653 F.2d 126 (4th Cir. 1981); Powell v. Alabama, 287 u.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932) (constitutional right to counsel includes right to counsel of one's choice). Jacobs still had a claim that the defendants intentionally interfered with his counsel of choice, and Hatcher

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[5]Furthermore, in plaintiffs' cross-motion for sanctions they again ask for discovery. They have failed to show why discovery would be necessary to litigate these Rule 11 motions. Discovery would, however, be helpful to the criminal defense of Mr. Hatcher who now faces 14 charges of second degree kidnapping.

and Jacobs still had a claim that their joint defense had been impaired.

Plaintiffs have alleged a widespread conspiracy involving high-level state and county officials. It is absurd to think that these allegations were suddenly unimportant by May 2, 1989. Furthermore, the basis of the complaint is that the State promised Hatcher and Jacobs that it would not prosecute them. If this were true, the alleged breach of this agreement still exists as to Hatcher and even as to Jacobs following his guilty plea.

Plaintiffs alleged that the prosecution of Hatcher and Jacobs was barred by the Double Jeopardy Clause. Those claims, if they were valid to begin with, were every bit as valid when plaintiffs dismissed the case. None of the damage claims and few of the requests for equitable relief were affected by any event occurring between the date of filing and the date of dismissal. Hatcher and Jacobs remained subject to the same purportedly unconstitutional prosecutions, and counsel's assertion that the alleged oppression of civil liberties in Robeson County had suddenly ceased is not credible.

Defendants contend that a financial decision was made that the damage claims did not warrant the extensive expenditure of time and professional resources. Such a decision should have been made before suit was filed. After the dismissal, Mr. Pitts was quoted as saying that the case was dismissed after the Attorney General's Office "made it very clear that ... everything was going to be arm's length warfare." Defendants' Memorandum, Exhibit 3 (undated Raleigh News and Observer article). The court concludes that plaintiffs brought the suit for publicity purposes and dropped it when major opposition resulted. This in itself violates Rule 11.

Counsel contended at the hearing that the suit was dismissed because the State had successfully split Hatcher and

Jacobs. However, this fact makes none of their claims less cognizable, and, more importantly, there is evidence that Hatcher and Jacobs had parted ways before even the original complaint was filed. Plaintiffs' Memorandum, Exhibit 56.

This court is forced to conclude that plaintiffs' counsel never intended to litigate this § 1983 action and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs. All of these purposes are improper and warrant sanctions under Rule 11. Even if the complaint had a proper legal and factual basis, sanctions would be appropriate since this court finds that the purpose of the lawsuit was improper. See e.g., Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987).

COUNSEL FAILED TO MAKE A REASONABLE INQUIRY TO DETERMINE IF THE COMPLAINT WAS WELL GROUNDED IN FACT AND WARRANTED BY EXISTING L

Plaintiffs filed a 35 page complaint and a 30 page amended complaint, much of which consisted of editorialization and a history lesson which even included a discussion of the use of segregated restrooms and water fountains in Robeson County since the time of Reconstruction. A complaint in federal court is supposed to be a "short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint is neither short nor plain and much of it, if not all of it, fails to show that any plaintiff is entitled to any relief. The complaint is riddled with claims that justify Rule 11 sanctions.

First, plaintiffs argue that the subsequent prosecution violates the Double Jeopardy Clause. First year law students learn that the Double Jeopardy Clause does not prohibit

subsequent prosecutions by different sovereigns. This concept was reaffirmed by the United States Supreme Court just four years ago in Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Heath is the latest in an unbroken chain of decisions ranging back at least as far as United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed 314 (1922). If plaintiffs' contention qualifies as a good faith argument for reversal of existing law, then precedent means nothing, and we will have to relitigate forever settled concepts of law. Plaintiffs also contend that the "tool of the same authorities" exception justifies their double jeopardy claim. Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). This exception, however, does not bar cooperation between sovereigns; plaintiffs must establish that State officials had little or no independent volition in the State proceedings. United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976). Plaintiffs allege, however, that the State officials instituted and controlled the subsequent proceedings; therefore, plaintiffs knew they had no basis for making a double jeopardy allegation.[6] Mr. Pitts even admitted to the press after filing the complaint that no double jeopardy problem existed. Pattishal, Justice in Robeson County: Carroboro Lawyers, Southern Racism, Bizarre Politics, and Death in the Cocaine Wilds, Robeson County Leader, April 13, 1989.

Second, plaintiffs contend that Hatcher's Fifth Amendment rights were harmed when the state tried to extract incriminating testimony from Jacobs. Amended Complaint, Par. 51. Fifth Amendment protection is personal to the individual whose testimony is being compelled. Moran v. Burbine, 475 U.S. 412 ,433, 106 S.Ct. 1135, 114, 89 L.Ed.2d 410, 438 (1986). Any testimony from Jacobs concerning Hatcher does not

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[6]Plaintiffs even alleged that the prosecution violated the state Double Jeopardy Clause, which cannot be asserted in a § 1983 action.

implicate Hatcher's right against self-incrimination. This claim has no basis in the law.

Third, plaintiffs requested an injunction of the State criminal proceedings, which is clearly barred by federal abstention doctrine. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Hatcher and Jacobs had ample opportunity to present their federal constitutional claims regarding the validity of the prosecution to the state courts. Judice v. Vail, 430 U.S. 327, 337, 97 S.Ct. 1211, 51 L.Ed.2d 376, 385 (1977). Plaintiffs had no basis for asserting that the state prosecution was brought in bad faith. Int he context of Younger abstention, bad faith generally means without a reasonable expectation of conviction. Suggs v. Brannon, 4\804 F.2d 274, 378 (4th Cir. 1986). Hatcher and Jacobs have never denied taking hostages, so there is simply no basis for believing that the State did not have a reasonable expectation of conviction. Plaintiffs have presented this court with no cases applying a Younger exception which even remotely resembles this case; their allegations of bad faith in affidavits submitted to the court are nothing but speculation. Furthermore, plaintiffs have failed to present one fact indicating that the prosecution was initiated to harass the plaintiffs.

Fourth, there are serious standing problems with many of the plaintiffs' claims. The complaint alleges that the prosecution of Hatcher and Jacobs has chilled their First Amendment expression. However, the Supreme Court has held that allegations of mere chill without any objective harm is not grounds for equitable relief. Laird v. Tatum, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972). Plaintiffs have not presented any fact showing a specific, present objective harm or a threat of specific future harm.

Fifth, plaintiffs misstate numerous facts in an effort to implicate the defendants in a massive and sinister conspiracy.

Plaintiffs assert that the district attorney "serves as the criminal prosecution arm of defendant Robeson County and as such makes policy in police investigation and criminal prosecution matters for Robeson County ...." Amended Complaint, Par. 9-10. A simple reading of N.C.G.S. 7A-61, et seq. indicates that the district attorney is an officer of the STate and neither an agent nor an employee of Robeson County. Plaintiffs further allege that defendants Britt, Townsend and Sampson serve as agents or employees of Robeson County. These individuals are State officers and do not work for Robeson County. Plaintiffs also allege that District Attorney Britt refused and failed to discipline, train and supervise Sheriff's deputies. Amended Complaint, Par. 18. North Carolina District Attorneys possess no such power or responsibility.

Plaintiffs' counsel have previously misstated the duties and responsibilities of public officials named in a suit to implicate them in a conspiracy. Mr. Pitts, in Waller v. Butkovich, 584 F.Supp. 909, 935 n.5 (M.D.N.C. 1984), was cited for making misrepresentations concerning state law enforcement personnel. It would appear that a similar tactic has been employed in this present matter.

Sixth, one of the major allegations in the complaint is that the Governor, the Attorney General, and the District Attorney entered into an agreement that Hatcher and Jacobs would be prosecuted in federal and not state court. However, an examination of the North Carolina General Statutes reveals that neither the Governor nor the Attorney General possesses the power to bind the State not to prosecute.

As early as February 26, 1988, plaintiffs' counsel had access to the transcript of the negotiations leading to the hostage release agreement as well as a copy of the written agreement. Nothing in the agreement between Hatcher and Kirk, or in any of the negotiations, suggests an agreement that Hatcher and Jacobs would not face North Carolina charges, and none

of the negotiators had the authority to so agree.

Seventh, plaintiffs have acknowledged to the court that when they filed the complaint asking for a temporary restraining order they did not possess facts sufficient to establish the necessity of such an order. In Plaintiffs' Memorandum and Opposition to Defendants' Motion for a Protective ORder, plaintiffs wrote:

> Plaintiffs anticipate that as a result of [deposing defendant Bowman] they will be in a position to apply to this court for temporary injunctive relief and make the showing required by Rule 65(b) of the Federal Rules of Civil Procedure. Plaintiffs should be permitted to pursue that standard course of action.

It is not a standard course of action to file a complaint and then conduct discovery in the "anticipation" that the complaint will prove warranted. In fact, such a course of conduct merits Rule 11 sanctions.

Finally, the complaint is filled with serious allegations of malfeasance of duty and criminal conduct on the part of high ranking state and local officials. Many of these allegations have nothing to do with this case or these plaintiffs and many are factually unsubstantiated.

For example, plaintiffs allege that a black inmate recently died while in Sheriff Stone's custody. Amended Complaint, Par. 27. The inmate's estate and family are not parties to this action and none of the plaintiffs were damaged by the inmate's death. Plaintiffs also allege that Sheriff Stone is engaged in illegal drug trafficking, but allege no injury special to them and have failed to produce one hard fact to justify this allegation.

Plaintiffs allege that blacks and Indians in Robeson County

have been subject to abusive behavior, but none of these plaintiffs allege that they have been assaulted or injured. Amended Complaint, Par. 15. Plaintiffs allege that Robeson County is beleaguered by poverty, illiteracy, and violence, none of which has anything to do with these plaintiffs stating a claim against these defendants. Amended Complaint, Par. 26.

Plaintiffs allege that Britt, Townsend, Thornburg and Morgan conspired to orchestrate the appointment of Townsend as District Attorney and to use State Bureau of Investigation agents as political police to discredit the only Republican candidate. Amended Complaint, Par. 44. Firs, counsel has failed to demonstrate that they had any factual basis for this allegation. Second, it has nothing to do with this case; the Republican candidate is not a party and none of the plaintiffs allege any injury from this incident.

All of this gratuitous commentary on the life and times in Robeson County, even if true, doe snot support any of the claims of relief; this court can conclude only that counsel included them for publicity and to intimidate the defendants and other involved in the Hatcher and Jacobs prosecution.

Counsel has submitted a stack of affidavits and exhibits purporting to explain why they believed they had a factual basis for filing the suit. The court has reviewed this material and is not impressed. Most of the affidavits, particularly those of counsel, are self-serving and largely based on hearsay and speculation. Counsel may subjectively believe these allegations to be true (and some of them may even be true), but Rule 11 applies an objective test. Counsel simply did not have a factual basis which would lead a reasonable attorney to believe that this civil action was justified.

In summary, the court finds that the entire complaint is tainted by improper purpose, and that counsel failed to

conduct a reasonable inquiry into the factual and legal allegations they were making.[7] Sanctions are imposed not merely because the legal and factual assertions in the complaint were erroneous; they are imposed because counsel would have discovered they were erroneous upon minimal research and investigation. A reasonable attorney would not have believed that this complaint was well grounded in fact or warranted by existing law.

PLAINTIFFS' CROSS-MOTION FOR RULE 11 SANCTIONS

As noted above, plaintiffs' counsel has filed a Rule 11 motion in response to defendants' Rule 11 motion, in which plaintiffs' counsel ask for discovery and an evidentiary hearing. Discovery is not permitted on Rule 11 motions absent extraordinary circumstances. See Adv. Com. Note to Fed. R. Civ. P. 11. No extraordinary circumstances exist int his case justifying discovery or an evidentiary hearing. For the reasons stated previously in this order, defendants' Rule 11 motion was properly filed, and the Rule 11 motion of plaintiffs' counsel must be and is hereby denied.

SANCTIONS ON PLAINTIFFS' COUNSEL

Needless to say, the imposition of sanctions under Rule 11 is not done lightly, or without great reflection on the part of

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[7]Mr. Kunstler states in an affidavit to the court that he ha dno personal knowledge of facts justifying the complaint and that he relied exclusively on Mr. Nakell. Plaintiff's Memorandum, Exhibit 3. In light of the serious allegations in the compalint, Mr. Kunstler's total reliance on other counsel is itself a violation fo Rule 11. Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir. 1987).

the court. With this in mind, the court notes that throughout the history of this country, there have been numerous attorneys specializing the area of civil rights. These attorneys have played an invaluable role in instigating and promoting numerous societal goals, many of which we now take for granted. Certainly the respondent Mr. Kunstler has been a leading civil rights attorney for many years. Nonetheless, Rule 11 applies to all attorneys, civil rights lawyers are not excepted. Oliver v. Thompson, 803 F.2d 1265, 1280-81 92d Cir. 1986), cert. denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). The court is certain that today's ruling in no way will deter civil rights lawyers from filing legitimate complaint sin the future to protect the civil rights of others and the Constitution that we all hold so dear.

This court has ruled on one issue and one issue only: the pending Rule 11 motions. The parties have attempted to lead this court into a broader inquiry into alleged corruption in Robeson County in general, and in Robeson County and North Carolina law enforcement in particular. Whether these allegations are true or false is not the issue currently before the court. The sole issue is whether the plaintiffs' counsel conducted a reasonable inquiry to determine if the complaint filed on January 31, 1989 and the subsequent amended complaint were well grounded in fact and law and were not filed for an improper purpose. Even if it were later determined that the allegations raised in those complaints were true, this court finds that the conduct of plaintiffs' counsel at the time of the filing of the original and the amended complaint is nonetheless sanctionable.

Having ruled that plaintiffs' counsel have violated Rule 11, sanctions are mandatory. Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). The first purpose of sanctions under Rule 11 is to compensate the offended parties for all reasonable expenses incurred by reason of the Rule 11 violation. Accordingly this court hereby imposes liability on William M.

Kunstler, Barry Nakell, and Lewis Pitts, jointly and severely, in the amount of NINETY-TWO THOUSAND EIGHT HUNDRED THIRTY-FOUR DOLLARS AND TWENTY-EIGHT CENTS ($92,834.28), representing legal fees and expenses incurred by the State defendants represented by the Office of the Attorney General of North Carolina in the amount of EIGHTY-THREE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND FIFTY-EIGHT CENTS ($83,613.58) and Robeson County defendants represented by Steven C. Lawrence of the law firm of Anderson, Broadfoot, Johnson & Pittman in the total amount of NINE THOUSAND TWO HUNDRED TWENTY DOLLARS AND SEVENTY CENTS ($9,220.70). This court has reviewed the affidavits filed by the attorneys of the North Carolina Attorney General's Office and finds the computation and final statement of costs and expenses incurred by the State in the defense of this matter to be reasonable and accurate, and also finds the affidavit of Steven Lawrence, Esquire, on behalf of the County defendants to be reasonable and accurate. Accordingly, this court has based its compensatory sanctions on these certified costs and expenses. The court further orders that these amounts be remitted to the Clerk of the United States District Court for the Eastern District of North Carolina with interest at the rate of 8.19% per annum from the date of the filing of this order. When these sums are received by the Clerk of this court, he shall in turn remit to the State of North Carolina the amount of EIGHTY-THREE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND FIFTY-EIGHT CENTS ($83,613,58) plus accrued interest and shall remit to Robeson County the amount of NINE H\THOUSAND TWO HUNDRED TWENTY DOLLARS AND SEVENTH CENTS ($9,220.70) plus accrued interest.

Compensation to the offended parties is not the only purpose for sanctions under Rule 11, however. In addition, the court may award sanctions to serve as a deterrence to others and as punishment to the particular attorneys involved. The court hereby imposes these punitive sanctions because of

the egregious nature of the violations of Rule 11 in the present case. This is not a typical Rule 11 case in which an attorney may have been a little careless or sloppy in filing an improper complaint. Plaintiffs' counsel alleged that high-ranking public officials of both Robeson County and the State of North Carolina willfully (Amended Complaint, Par. 58) violated the constitutional rights of a number of individuals, and then plaintiffs' counsel took pains to publicize these allegations through the media. Accordingly, this court imposes additional sanctions on William M. Kunstler, Barry Nakell, and Lewis Pitts each in the amount of TEN THOUSAND DOLLARS ($10,000) which shall not bear interest. These sanctions of TEN THOUSAND DOLLARS ($10,000) each shall be remitted to the Clerk of the United States District Court for the Eastern District of North Carolina for credit and transmission to the Treasury of the United States.

This court further orders that until the aforementioned amounts are paid, with interest on those sums ordered to be paid with interest, William M. Kunstler, Barry Nakell and Lewis Pitts are hereby prohibited from appearing in or practicing before the United States District Court for the Eastern District of North Carolina.

Accordingly, it is hereby ORDERED that the motion of the defendants (State and County) for sanctions against William M. Kunstler, Barry Nakell, and Lewis Pitts is GRANTED in the amounts and forms specified above. It is further ORDERED that the plaintiffs' cross-motion for sanctions is DENIED.

This 28th day of September, 1989.

MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
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